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THE FRENCH EXPERIENCE WITH DUTY TO RESCUE: A DUBIOUS CASE FOR CRIMINAL ENFORCEMENT

Edward A. Tomlinson*

I. INTRODUCTION

The growing convergence between the common law and civil law traditions has been a favorite theme of comparativists in recent years. This overall pattern finds a striking exception in the duty to rescue. Common law countries vigorously oppose recognizing any general duty to rescue; failure to rescue is an omission for which there is no tort or criminal liability on the would-be rescuer's part, absent special facts giving rise to a duty to act.¹

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1. Common law courts have found a duty to rescue, enforceable by the criminal law, if there is some family or even business tie between the defendant and the person in peril, if a non-criminal statute requires the defendant to act, if a contract imposes such a duty, if the defendant voluntarily assumed responsibility for caring for the person in peril, if the defendant created the peril, if the defendant had a duty to control the person creating the peril, or if the peril occurred on the defendant's land. 1 WAYNE R. LAFAVE AND AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* 283-90 (1986 and Supp. 2000).

Congress has also imposed a duty to rescue on hospitals. The Emergency Medical Treatment and Active Labor Act (EMTALA), enacted by Congress in 1986, requires hospital emergency rooms to treat, or transfer appropriately, persons with an emergency medical condition and women in active labor. 42 U.S.C. § 1395dd (West 1999). A hospital must also provide all persons who present themselves at an emergency room with an appropriate medical screening examination to determine if such a condition exists. *Id.* That statute responded to the refusal by hospitals to treat emergency patients because the patients were unable to pay, a practice commonly called "patient dumping." Lynn Healey Scaduto, *The Emergency Medical Treatment and Active Labor Act Gone Astray: A Proposal to Reclaim EMTALA for Its Intended Beneficiaries*, 46 U.C.L.A. L. REV. 943, 945 (1999). Such refusals to treat were largely legal under prior law. Karen H. Rothenberg, *Who Cares? The Evolution of the Legal Duty to Provide Emergency Care*, 26 HOUSTON L. REV. 21 (1989). EMTALA thus recognizes a duty to rescue, applicable to hospital emergency rooms, but the House Judiciary Committee deleted from the Act all criminal penalties because it believed them to be "unnecessary" and "unwise." H.R. Rep. No. 99-241, pt. 3 at 7-8, *reprinted in* 1986 U.S.C.C.A.N. 726, 729-30. The Act's specific duty to rescue is enforceable through

Most civil law countries, on the other hand, recognize a general duty to rescue in their criminal codes.² In addition, the violation of this criminal law duty normally results in tort liability. This approach, unlike the common law approach, imposes what is often called a duty of easy rescue not just on persons with some special relationship to the person in need of rescue, but on every person.³ In the words of one leading civil law commentator, this difference between the two traditions is "astonishing."⁴ Common law commentators tend to be more cautious in describing the difference.⁵ Nevertheless, a significant number strongly believe that the civil law approach is superior.⁶ How can our legal system allow the strong swimmer

administrative proceedings initiated by the government and though private civil actions brought in the courts. Joan M. Stieber and Linda J. Spar, EMTALA in the '90s - Enforcement Challenges, 8 HEALTH MATRIX 57, 60-62 (1998).

2. A 1966 study surveyed thirteen European counties that had duty to rescue provisions in their criminal codes. Alexander W. Rudzinski, *The Duty to Rescue: A Comparative Analysis*, in THE GOOD SAMARITAN AND THE LAW 91-134 (James M. Ratcliffe, ed., 1981). These countries, with the date or dates of the provision's enactment, are Portugal (1867), the Netherlands (1881), Italy (1889 and 1930), Norway (1902), Russia (1903-17), Turkey (1926), Denmark (1930), Germany (1935 and 1953), Poland (1932), Romania (1938), France (1941 and 1945), Hungary (1948 and 1961), and Czechoslovakia (1950). A later 1993 study adds Belgium, Switzerland, Spain, Finland, and Greece to the list of countries with duty to rescue statutes: the author of that study reports in addition that all Eastern European countries (except Albania) and most Latin American countries have similar statutes. See Alberto Cadoppi, *Failure to Rescue and the Continental Criminal Law*, in THE DUTY TO RESCUE. THE JURISPRUDENCE OF AID 93-131 (Michael A. Menlowe and Alexander McCall Smith, eds., 1993). The only significant holdout among the civil law countries appears to be Sweden. *Id.* at 104.

3. "Easy rescue" is usually defined as a rescue which does not expose the rescuer to any significant risk.

4. See Cadoppi, *supra* note 2, at 93.

5. Alexander McCall Smith, *The Duty to Rescue and the Common Law*, in THE DUTY TO RESCUE. THE JURISPRUDENCE OF AID 55-91 (Michael A. Menlowe and Alexander McCall Smith, eds., 1993) (flexible common law approach encourages courts to impose a duty to rescue where moral duty to rescue is particularly strong); 3 FOWLER V. HARPER, FLEMING JAMES, JR., AND OSCAR S. GRAY, THE LAW OF TORTS §18.6, AT 722-25 (no general duty to be a good Samaritan, but courts find duty to act in growing number of circumstances).

6. JOEL FEINBERG, HARM TO OTHERS 126-85 (1988); Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U.L. QUAR. 1 (1993); A.D. Woosley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 VA. L. REV. 1273 (1983); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980). For a more skeptical attitude on the duty to rescue, see Michael A. Menlowe, *The Philosophical Foundation of a Duty to Rescue*, in THE DUTY TO RESCUE. THE JURISPRUDENCE OF AID 5-53 (Michael A. Menlowe and Alexander McCall Smith, eds., 1993). The most well-known opponent of the duty to rescue is Richard Epstein, but he has not written extensively on the issue. See Richard Epstein, *A Theory of Strict Liability*, 2 J. LEG. STUD. 151, 189-204 (1971).

who watches a small child drown escape any liability by claiming that as a stranger he or she had no duty to rescue?

This article analyzes the duty to rescue in French law. It focuses on the criminal statute, first enacted in 1941, which severely punishes persons who fail to attempt an easy rescue. That statute, as will be seen, has a rather unwholesome pedigree; it also serves a number of functions not envisioned by those advocating duty to rescue statutes in the common law world. In the statute's earlier years, its implementation raised many interpretive difficulties.⁷ Over the years, however, a large body of case law has resolved most of these problems without producing, in the words of the leading civil law commentator, "particularly unacceptable results."⁸ That faint praise of the courts' work product is more than I believe the French approach deserves. Most contemporary French scholars nevertheless believe the statute has proved to be a success. According to two leading French penalists, the French have integrated into their ordinary vocabulary and every day mentality the new offense of refusing to render assistance to persons in peril.⁹ That assessment may be correct, but even if one assumes the successful reception of a duty to rescue in French criminal law, it does not follow that it would fit equally well in the less favorable terrain of the American common law system.¹⁰ I believe that our legal system differs from the French in too many ways to allow a successful transplant. We should not allow our moral outrage at the indifferent bystander who allows another to die to cloud our judgment on the appropriateness of imposing a duty to rescue.¹¹

7. See Cadoppi, *supra* note 2, at 122. In this article Professor Cadoppi addresses the courts' application of duty to rescue statutes throughout Europe. His book on the duty to rescue focuses on the Italian statute. See ALBERTO CADOPPI, *IL REATO OMISSIVO PROPRIO* (1988).

8. See *id.*

9. 2 ROGER MERLE AND ANDRÉ VITU, *TRAITÉ DE DROIT CRIMINEL. DROIT PÉNAL SPÉCIAL* NN1800, AT 1459 (1982) (hereafter cited as MERLE AND VITU, *DROIT PÉNAL SPÉCIAL*).

10. Our common law terrain is less favorable because we already have a well-developed law of criminal omissions which punishes the most culpable failures to rescue. See discussion in the text *infra* at notes 45 to 57 on the gaps in French criminal law filled by the duty to rescue. In addition, French law normally compensates the rescuer for any injuries incurred. Most rescuers are considered to be temporary collaborators in a public service and receive through the administrative courts the same compensation as do public employees injured in the performance of their duties. M. LONG ET AL, *LES GRANDS ARRÊTS DE LA JURISPRUDENCE ADMINISTRATIVE* 388-401 (12th ed. 1999) (discussing Council of State's case law). Remedies are also available against the rescued in the regular courts, based on the theories of an implied in fact or an implied in law (*gestion d'affaires*) contract.

11. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 633 (1978) (duty to rescue statutes not rooted in protection of public but in outrage against indifferent bystanders). The most recent case of public outrage involved one David Cash, Jr., who did nothing while his best

There are four principal arguments against bad Samaritan statutes enforcing criminally a duty to rescue.¹² First, these statutes enforce a morality of benevolence by requiring one person to confer a benefit on another whose sole basis for claiming that benefit is the presence of some danger to the recipient's well being. Second, there is no principled way to draw the line between the aid which the law should require and the aid which the law should leave to the dictates of each individual's conscience. Third, the affirmative duties imposed by bad Samaritan statutes unduly interfere with individual liberty. Fourth, causing harm is a necessary condition for liability; the failure to rescue does not satisfy this condition because it merely allows harm to happen.

The most forceful of these objections is the line-drawing argument. The other objections—forced enrichment of another, interference with autonomy, and no causation—fade away when confronted with the hypotheticals presented by the proponents of easy rescue, hypotheticals in which the failure to rescue reflects an appalling indifference for human life. Proponents' writings are full of malicious persons who fail to warn blind persons of approaching manholes, who fail to lift the heads of sleeping drunks from puddles of water, who fail to throw ropes from bridges to save drowning bathers, or who fail to do anything to rescue small children wandering lost in the woods.¹³ There are also those selfish pool loungers who refuse to put down their drinks to grab drowning children by the trunks and pull them from the pool.¹⁴ These cases are easy cases for liability because the blameworthiness of the omission is clear, assuming the defendant was aware of what was happening and had the physical capacity to intervene.

In these cases, concerns about forced charity, interference with autonomy, and lack of causation seem misplaced, or at least unconvincing. However, these hypotheticals are contrived and skewer the issue because they are just that: hypothetical cases. In real life, cases rarely arise where the danger is so clear and the rescue is so easy. More importantly, when they do

friend sexually assaulted and murdered a young girl in a lavatory of a Nevada casino. See Natalie Perrin-Smith Vance, *Comment: My Brother's Keeper? The Criminalization of Nonfeasance: A Constitutional Analysis of Duty to Report Statutes*, 36 CAL. W. L. REV. 135 (1999). For the reaction of the Nevada legislature, see note 218, *infra*.

12. This paragraph largely follows FEINBERG, *supra* note 6, at 126-85. Professor Feinberg rejects these four arguments (stated in somewhat abbreviated form on pages 129-30) and supports a duty of easy rescue.

13. See FEINBERG, *supra* note 6, at 127, 154, 163; James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 92, 112 (1908).

14. Jefferie G. Murphy, *Blackmail: A Preliminary Inquiry*, 63 MONIST 168 n.6 (1980).

arise, rescue almost always occurs. Few people are likely to allow another to die or to suffer serious injury if they could prevent it with a flick of the wrist. In addition, the desirability of punishing inaction in these easy cases does not outweigh the line-drawing problems raised by applying duty to rescue statutes to more messy, but real world situations.

The most persuasive statement of the line-drawing objection appears in Lord Macaulay's Introductory Notes to the 1837 Indian Penal Code.¹⁵ Macaulay presented his own share of fact situations, many of them skewered against imposing a duty to rescue. However, his most striking example was by no means hypothetical: What was a good English gentleman in nineteenth century India to do when confronted by crowds of starving beggars whose immediate needs would quickly consume his available resources? With respect to this and many other fact situations, Macaulay hammered home the crucial question: How much money or how much exertion or, in other words, how many 'steps' must a person take to save a life when each extra step, considered by itself, is trivial?¹⁶ For Macaulay, there was no acceptable answer to that question; therefore, he rejected a general duty to rescue and limited the duty to act to assist another to situations where there was some special relationship between the potential rescuer and the person in peril.¹⁷ This latter category of cases was different because the criminal law could expect from persons with ties to the victim what it could not expect from strangers, such as exposure to inconvenience, pecuniary loss, and even personal danger. Macaulay's position has prevailed in most common law jurisdictions.¹⁸

Proponents of a general duty to rescue respond that well-drafted statutes can alleviate line-drawing problems.¹⁹ For example, duty to rescue statutes could be drafted to apply only to eyewitnesses to life-threatening perils, thus excluding lesser perils and perils about which would-be rescuers have only second-hand knowledge. Narrowing the duty to rescue in that fashion does reduce the number of occasions on which line-drawing problems will arise but does not address, much less resolve, the basic line-

15. Lord Thomas Macaulay, *Notes on the Indian Penal Code*, in 7 WORKS OF LORD MACAULAY (Trevelyan ed. 1866) 493-97, *reprinted in* THOMAS C. GREY, *THE LEGAL ENFORCEMENT OF MORALITY* 159-63 (1983).

16. *Id.* at 496-97.

17. David Cash, Jr., *see supra* note 11, made a similar point in far less appealing terms: "[L]et us be reasonable here. Is my life supposed to halt for a like days, weeks and months on end... the simple fact remains I do not know this little girl [the murder victim]. I do not know starving children in Panama." *See* Vance, *supra* note 11, at 138 n. 34.

18. 1 LAFAYE AND SCOTT, *supra* note 1, at 282-96.

19. *See* FEINBERG, *supra* note 6, at 155-57.

drawing problem. The question remains: What response should we expect from the defendant who is an eyewitness to a life-threatening peril? How many steps must that person take and what risks must he or she accept? When can the defendant rely on the intervention of other, more appropriate rescuers, such as the police or emergency medical personnel? Under any duty to rescue statute, the fact finder—in this country, the jury—must still pass judgment on the appropriateness of the defendant's response to another person's peril. That judgment will often be a difficult one.

To address this problem, Professor Feinberg, one of the more thoughtful American proponents of the duty to rescue, suggests drafting a statute limiting the duty to cases where the jury finds that the defendant had an opportunity to rescue which clearly posed no unreasonable risk, cost, or inconvenience.²⁰ He believes such a statute would resolve the line-drawing dilemma by limiting criminal liability to clear cases. I am more skeptical, given the inherent vagueness of any reasonableness test and given Feinberg's silence on whether an objective or subjective standard applies in cases where the defendant unreasonably, but in good faith, believed that he or she did all that was necessary to respond to the peril. Feinberg, while acknowledging that his test remains "relatively vague" and allows juries considerable discretion, argues that duty to rescue statutes are still workable because particularistic judgments as to reasonableness are endemic in the law.²¹ Other proponents of the duty to rescue make similar claims.²² No doubt line-drawing is a problem in many areas of the law, but that fact should not relieve proponents of the duty to rescue from establishing more concretely that the change in the law which they advocate will not produce line-drawing problems so severe as to outweigh its anticipated benefits.

The French experience provides some help in resolving this debate. In France, the duty to rescue statute has remained largely unchanged for nearly six decades, and there is a large body of case law interpreting and applying its provisions. This large number of cases demonstrates that the duty to rescue is taken seriously in France; failure to rescue often results in a criminal prosecution, initiated either by the State or, as is possible in France, by the victim or the family of a deceased victim. These cases also demonstrate how one legal system has resolved the line-drawing and other interpretive problems raised by the duty to rescue. Similar problems are likely to arise in this country if we enact and seriously enforced duty to

20. *See id.*

21. *See id.* at 157 (for examples of duty of reasonable care in tort cases, provocation defense in murder cases, and retreat rule in self-defense cases).

22. *See, e.g.,* Woosley, *supra* note 6, at 1277.

rescue statutes. More narrowly drafted statutes may alleviate some of the problems encountered in France, but no general duty to rescue statute can avoid delegating to the courts the responsibility for determining case by case what response the law expects from persons confronting a sudden or unexpected peril.²³ In France, courts have performed that difficult task to produce results that are not "unacceptable"²⁴ and perhaps even creditable. For those advocating a duty to rescue, the French experience may demonstrate that their proposal can work.

My appraisal of the French experience is less positive. To me, the French experience demonstrates that the critics of a general duty to rescue are correct when they argue that enforcing any such duty creates serious line-drawing problems and that those problems are likely to outweigh any benefit obtained by recognizing the duty. What convinces me is the fact patterns in the reported cases under the statute. As we shall see, the statute functions like a loose cannon; prosecutions have occurred in surprising situations never envisioned by most advocates of the duty to rescue. More importantly, the defendant's blameworthiness is not clear-cut in many of the prosecutions. In other words, in many cases, to use Feinberg's test, it does not appear that a jury could find that it was "clear" beyond a reasonable doubt that the defendant confronted a person in grave peril and could have done more to assist that person without exposure to significant inconvenience, pecuniary loss, or personal injury. Granted, some of those prosecutions resulted in acquittals, but the State still put the defendant on trial and trial judges—jury trial is not available—reviewed the appropriateness of the defendant's response to what was most likely an emergency situation not of the defendant's choosing. That second guessing in the criminal courtroom of the defendant's borderline behavior strikes me as undesirable. In addition, in most of the cases where a convicted defendant's blameworthiness is clear, the defendant could have been convicted of some other offense in a common law jurisdiction not recognizing a general duty to rescue. We already punish the most culpable omissions by recognizing a duty to act where there is some special relationship between the defendant and the person in need of rescue or by enacting special statutes punishing inaction in discrete situations (e.g., hit and run statutes). Therefore, the French experience counsels against enforcing a general duty to rescue through the criminal law.

23. George Fletcher argues that the principal problem with affirmative duties, such as the duty to rescue, is that they fall due at a time and place over which the potential defendant has no control. See George P. Fletcher, *On the Moral Irrelevance of Bodily Movements*, 142 U. PA. L. REV. 1443, 1451 (1994).

24. See Cadoppi, *supra* note 2, at 93.

In addition, many cases where the defendant's culpability is clear are better handled under narrower duty to report statutes. A good example is the *Dominici* case, one of the few French cases where a convicted defendant's blameworthiness is clear but where no conviction would have been possible in the common law world.²⁵ In that case, three English tourists, an elderly couple and their daughter, were murdered in the late 1940s in an isolated area of Provence. The Dominici family lived a reclusive life on a nearby farm where the twentieth century had not yet arrived. Gaston Dominici, the family's elderly patriarch, was prosecuted for those murders. The case attracted nationwide interest because many believed that the largely mute old man, perhaps shouldering the blame to protect his two adult sons, was the innocent victim of aggressive city-slickers dispatched to solve the case so as to assuage an angry British press and populace.²⁶

Prosecutors believed one of the sons, Gustave, to have been involved in the killings but never acquired sufficient evidence to charge him with murder. Gustave, by his own admission, was the first to arrive at the crime scene. When he arrived, one of the victims, the daughter, was still alive and groaning. Gustave's response was to walk to the nearest road and flag down a bicyclist. He asked the bicyclist to tell the police in the next town that he, Gustave, had found a corpse. Gustave then continued with his daily chores. When the police arrived at the crime scene several hours later, the daughter was dead. The prosecutor subsequently charged Gustave with failing to

25. CA Aix, December 23, 1952 (*Dominici*), 1953 D. Jur. 227 and 1953 J.C.P. II 7429 note P.A. Pageaud. For another case where the defendant's blameworthiness seems clear but no conviction would be possible in the common law world, see TC Abbeville, July 12, 1943, 1944 J.C.P. II 2624 note Jean Bornecque (a strong swimmer convicted for not jumping into a river to save a child).

Citations to French cases normally include the court (here the Court of Appeals or CA for Aix and the correctional court or TC for Abbeville) and the date of decision but not the parties' names. For well known cases, I have added, as I have done here, the defendant's name; French jurists often identify such cases by a party's name. The citation also includes the unofficial report where the text of the decision may be found. The two lead reporters are *Dalloz* (D. Jur. with "Jur." referring to the case law section) and *Juris-Classeur Périodique* (J.C.P. II with "II" referring to the case law section). Most decisions published in these reporters (some decisions appear in both reporters, as occurred with *Dominici*) are followed by a scholarly note commenting on the decision. Where there is such a note, the author's name is part of the citation, as you see here with the reference to the case note by P.A. Pageaud in *Juris-Classeur Périodique*. Both *Dalloz* and *Juris-Classeur Périodique* also publish statutory and regulatory texts ("Lég." in *Dalloz* and "III" in *Juris-Classeur Périodique*) and a selection of longer articles ("Chr." in *Dalloz* and "I" in *Juris-Classeur Périodique*). The popular name for *Juris-Classeur Périodique* is *La Semaine Juridique*.

26. For more on the *Dominici* case, see JEAN-MARC THÉOLLEYRE, *L'ACCUSÉE: 45 ANS DE JUSTICE EN FRANCE* (1945-90) 126-86 (1991). Théolleyre covered criminal trials for France's leading newspaper, *Le Monde*.

rescue her. Not surprisingly, the correctional court, the first level trial court, convicted. The Court of Appeals, the second level trial court, also convicted and sentenced Gustave to six months in prison. The latter court found, in phrases often repeated by subsequent commentators, that the legislature's purpose in enacting the duty to rescue statute was to punish the "callous indifference" and "excessive egoism" of persons like Gustave. No doubt the defendant's conduct reflected those vices and deserved condemnation, but that conduct seems better characterized as either the failure to report a crime or peril or the filing of a false report.²⁷

Duty to report statutes do not often raise the serious line-drawing problems inherent in duty to rescue statutes. Of course, there was a line-drawing problem in the *Dominici* case itself. Should Gustave have waited for a car or have found a neighbor with a telephone, a modern device not found on the Dominici farm? Those questions are difficult ones. However, in most cases, at least in the more technologically sophisticated twenty-first century, one can report a crime or other peril merely by calling 911 or some other emergency number. For example, the eyewitnesses to Kitty Genovese's murder²⁸ might have prevented it by telephoning the police. They were blameworthy because they failed to do so and not because they failed to leave the safety of their apartments to confront a knife-wielding murderer on a subway platform. Such cases show that line-drawing is much easier when the law only imposes a duty to report and not a duty of personal intervention. In the latter situation, what do we expect a layperson to do when confronted with a seriously ill or wounded stranger? What risks must the layperson take? Should the law take into account the layperson's perhaps irrational fear of contagion or legitimate concern over making the situation worse? The difficulty of these questions suggests that a narrow duty to report may be more palatable as a first step in reforming the common law than a broader duty to rescue. This article does not directly address the merits of a general

27. The prosecutor could have charged the son under the duty to report statute in the French Penal Code. See note 81, *infra*. Most likely the prosecutor did not do so because the police considered Gustave to be a suspect in the murder. In France, the duty to report a crime does not apply to the offender; in other words, there is no duty to turn oneself in. See Cass. crim., March 2, 1961 (*Seggiaro*), D. Jur. 121 note Pierre Bouzat, 1962 J.C.P. II 12092 note Jean Larguier, and 1961 S. I 105 note M.R.M.P. "Cass. crim." refers to the Criminal Section of the Court of Cassation, France's highest court. "S." or Sirey refers to a now-defunct reporter.

28. In that case, thirty-eight apartment dwellers did nothing to alert police of a prolonged (thirty-five minute) and ultimately fatal attack which they observed taking place on subway platform below their windows. A.M. ROSENTHAL. THIRTY-EIGHT WITNESS (1964).

duty to report,²⁹ but the unsatisfactoriness of the French experience with the duty to rescue suggests that the duty to report may be a safer substitute.

II. PUNISHING OMISSIONS IN FRENCH CRIMINAL LAW

The text of the French duty to rescue statute, now codified as Article 223-6 of the 1994 French Penal Code,³⁰ is straightforward but it nevertheless conceals a number of interpretive problems. It reads:

Any person who willfully abstains from rendering assistance to a person in peril when he or she could have rendered that assistance without risk to himself, herself, or others, either by acting personally or by calling for aid, is liable

29. The French Penal Code enforces a general duty to report serious offenses. See note 81 *infra*. The common law offense of misprision of felony accomplished the same thing, but that offense has largely disappeared from American law and misprision has not been retained in most statutory codifications. See 1 LAFAYETTE AND SCOTT, *supra* note 1, at 174-76 and AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES (Official Draft and Revised Commentaries) §242.5 comment 5 (1980). However, in recent decades all fifty states have enacted statutes mandating the reporting of child abuse and roughly forty-two states have mandated the reporting of elder abuse. Douglas J. Besharov and Lisa A. Laumann, *Child Abuse Reporting*, 33 SOCIETY 40 (1996) and Jill C. Skabronski, *Comment, Elder Abuse: Washington's Response to a Growing Epidemic*, 31 GONZ. L. REV. 627, 634 (1996). These statutes mandate reporting of child abuse by healthcare professionals, social workers, teachers, and law enforcement officers, but at least sixteen child abuse statutes also cover any person who has knowledge of child abuse. Jessica R. Givelber, *Imposing Duties on Witnesses to Child Sex Abuse: A Futile Response to Bystander Indifference*, 65 FORD. L. REV. 3169; Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency*, 11 GEO. J. LEG. ETHICS 509, 517 n. 40 (1998). On Nevada's becoming the seventeenth state, see note 218 *infra*. Mandatory "universal" reporting is less common with respect to elder abuse. See Skabronski, *supra*, at 634-35.

The chief problems posed by mandatory reporting are under-enforcement and over-reporting. Prosecutions for non-reporting are rare. At the same time, the very existence of a reporting requirement increases the number of reports. Many of these reports are unfounded, resulting in wasted enforcement resources and harm to falsely accused individuals. Douglas J. Besharov, *"Doing Something" Serious about Child Abuse: The Need to Narrow the Grounds for State Intervention*, 8 HARV J. L. & PUB. POL. 539, 562-65 (1985) (over reporting by professionals). The over-reporting problem would surely become more critical if a state seriously enforced a universal reporting requirement.

30. For a translation of the 1994 Penal Code, see 31 AMERICAN SERIES OF FOREIGN PENAL CODES: THE FRENCH PENAL CODE OF 1994 (1999), with an introduction by Edward A. Tomlinson. For the French text, see the annual editions of the CODE PÉNAL published by Dalloz.

to the same penalties [i.e., five years imprisonment and a 500,000 francs fine].³¹

This language appears only to require rescues that are clearly easy ones—for example, rescues that do not pose any risk to the rescuer or third persons—and to offer the rescuer a choice between intervening personally and seeking aid from someone else, presumably by reporting the peril to the appropriate authorities.³² However, courts have not interpreted the text literally. To have done so would have gutted the statute, which requires “rendering assistance.”³³ Rendering assistance is rarely risk-free, and merely reporting a peril may be, according to the courts, ineffective assistance. So line-drawing problems have arisen.

In addition, the statutory text does not define “peril,” nor does it specify how the defendant learned that a person was in peril. Of course, to violate the statute, the bad Samaritan must have knowledge of the peril—i.e., he or she must “willfully abstain”³⁴—but there is no limitation, such as found in some European statutes,³⁵ that he or she must be an eyewitness to the peril. There also does not appear to be any requirement that the person in peril actually suffer harm following the defendant’s failure to rescue. Thus, as we shall see, a defendant who abstains from rescuing a person in peril cannot raise as a defense that someone else rescued that person or that the person miraculously escaped any harm.

The most striking feature of the French statute, and the feature which most sharply differentiates it from its four American counterparts, is the severity of the authorized punishment: five years of imprisonment and a fine of 500,000 francs. Of course, those penalties are the maximum authorized penalties. French courts retain broad discretion to impose lesser terms of imprisonment and to lower fines, to impose a fine rather than imprisonment, or to substitute other penalties, such as community service, license revocation, or the closure of a commercial establishment, for the authorized penalties.³⁶ Nevertheless, the French statute treats the failure to rescue as a

31. *See id.*

32. *See id.*

33. *See id.*

34. *See id.*

35. *See* Cadoppi, *supra* note 2, at 106 (the Netherlands, Italy, and Turkey).

36. *See* Edward A. Tomlinson, *Introduction to 1994 French Penal Code*, in 31 AMERICAN SERIES OF FOREIGN PENAL CODES: THE FRENCH PENAL CODE OF 1994 14-19 (1999).

serious offense and punishes it more severely than the Penal Code punishes most property offenses.³⁷

By contrast, the four American statutes imposing a general duty to rescue treat the failure to rescue as a petty misdemeanor at worst. Vermont, the first state to require easy rescue, imposes a mere \$100 fine for a willful violation.³⁸ Minnesota is slightly more severe and treats the failure to rescue as a petty misdemeanor punishable by no more than a \$200 fine.³⁹ Rhode Island and Wisconsin, on the other hand, authorize short terms of incarceration for failure to rescue. In Rhode Island, the offense is a petty misdemeanor punishable by imprisonment for no more than six months and by a fine of no more than \$500,⁴⁰ while in Wisconsin the offense is a class C misdemeanor punishable by imprisonment in the county jail for no more than thirty days and by a fine of no more \$500.⁴¹ In addition to assigning lighter penalties, the American statutes also define the underlying offense more narrowly than does the French statute. Both Minnesota and Rhode Island require that the defendant be present "at the scene of an emergency,"⁴² while the Vermont and Wisconsin statutes limit the duty to rescue to cases where the victim is exposed to "grave physical harm"⁴³ or to "bodily harm" from the commission of a crime.⁴⁴

There are at least two explanations for the severe penalties authorized in France for breach of the duty to rescue. The first is the historical setting at the time of the statute's enactment in 1941. As we shall see, the Vichy government that adopted the law did not have in mind the problem posed by the bad Samaritan. Rather, the government was responding to German pressure to punish French citizens who remained passive when Gaullist or

37. Larceny, for example, is punishable by three years of imprisonment and by a fine of 300,000 francs. See Article 311-3 of the 1994 Penal Code. Larceny by force is punishable by five years of imprisonment (the same penalty applicable to failure to rescue) if the victim does not suffer a total inability to work. See Article 311-4[1]4.

38. VT. STAT. ANN. tit. 12, §519a (1973). That section is not even in the Criminal Code. It is found in the Court Procedures Title and carries the misleading heading "Emergency Medical Care."

39. MINN. STAT. ANN. §604A.01 (2000 West Supp.). On the punishment for petty misdemeanors, see MINN. STAT. ANN. §609.02.4a (2000 West Supp.). The maximum fine was \$100 until raised by the legislature in 1997. Once again, the substantive offense is not part of the Criminal Code..

40. R.I. GEN. LAWS §11-56-1 (1994).

41. WIS. STAT. ANN. §940.34 (1996 and 1999 West Supp.). For the punishment provisions, see WIS. STAT. ANN. 5939. 51 (1996 and 1999 West Supp.).

42. See *supra* notes 39, 40.

43. See *supra* note 38.

44. See *supra* note 41.

other resistant fighters attacked occupying Nazi troops or sabotaged military or industrial facilities useful to the Nazis. Neither the Vichy government nor the Germans believed a small fine was an appropriate response to such passivity. The second explanation for the severe penalties is also historical but, unlike conditions at the statute's origins, remains relevant today. The statute survived Vichy's demise and the restoration of Republican legality in liberated France because it filled gaps created by the development of French criminal law—gaps which afforded immunity to defendants who, in most common law jurisdictions, would be guilty of substantive offenses, either as accomplices or as principals, because they remained passive despite a duty to act. Many of these cases now fall under the duty to rescue statute. Thus, the French statute serves functions other than the punishing of the bad Samaritan. For those cases, more severe punishment than a fine is often appropriate, and limiting liability to cases where harm results is often inappropriate.

The biggest gap filled by the French duty to rescue statute is the commission of substantive offenses by omission. The common law has long recognized that a defendant may be guilty of murder or other substantive offenses if the defendant had a duty to prevent the proscribed conduct or result.⁴⁵ The paradigmatic case is that of the strong swimmer who watches a young child drown in a pool of water. If the swimmer were the child's father or mother, he or she would have a duty to rescue and would be guilty of murder or manslaughter for the child's death, depending on the swimmer's mental state. Courts and commentators have struggled to determine what relationships, statutes, or undertakings impose on a defendant a duty to act. There is no general duty to act, but if the court finds a duty, then there is no barrier preventing the conviction, for a substantive offense, of the defendant who remained passive. In the common law world, neither the language of the statute defining the substantive offense—such as the use of active verbs like “kills” or “imprisons”—nor the uncertainty whether the defendant “caused” the harmful result precludes the defendant's liability for the substantive offense.

French law, on the other hand, has never recognized substantive liability for what civil law jurists call “commission by omission.”⁴⁶ Thus, parents who watch their children drown normally cannot be convicted for a

45. See 1 LAFAYE & SCOTT, *supra* note 1, at 284-89.

46. GASTON STÉFANI, GEORGES LEVASSEUR, AND BERNARD BOULOC, *DROIT PÉNAL GÉNÉRAL* n. 213-14, at 186-88 (16th ed. 1997); ROGER MERLE AND ANDRÉ VITU, *TRAITÉ DE DROIT CRIMINEL. PROBLÈMES GÉNÉRAUX DE LA SCIENCE CRIMINELLE. DROIT PÉNAL GÉNÉRAL* n.483, at 611-12 (7th ed. 1997) (hereafter cited as MERLE AND VITU, *DROIT PÉNAL GÉNÉRAL*). For the concept of commission by omission, see FLETCHER, *supra* note 11, at 585-88.

homicide offense. This result, although unpalatable to many, is a matter of basic legality to most French jurists. While the legislature may punish omissions—such as the failure to pay taxes or to file a report—if it chooses to do so, courts do not interpret active verbs such as “kill” or “imprison” to cover omissions, even omissions by a person under a duty to act. This restrictive approach to liability for omissions is not inherent in the civil law tradition. Nineteenth and twentieth century German courts, without any encouragement from the legislature, adopted a different tactic and developed a large body of case law addressing when a defendant’s omission was sufficient to hold the defendant responsible for a death or other substantive result. In 1975, the legislature endorsed the courts’ approach by including in the new German Penal Code an Article 13 on omissions. That provision allows the courts to find a duty to act on a case by case basis. Courts may hold a defendant responsible for the substantive offense “if principles of right require him to make sure that the result does not occur and if the failure to act is [morally] equivalent to bringing about the prohibited result by affirmative conduct.”⁴⁷

The lead French decision rejecting liability for commission by omission is the well-known early twentieth century case of the Imprisoned Woman (*La sequestrée*) of Poitiers. The dramatic facts of that case, widely publicized at the time by the popular press and subsequently immortalized by the novelist André Gide in his study *La sequestrée de Poitiers*,⁴⁸ revealed a large gap in French criminal law. Equally interesting for our purposes is that the facts also raise difficult line-drawing questions under duty to rescue statutes.

The facts of the case arose in Poitiers, a pleasant and historic university town in Western France. The imprisoned woman Blanche Monnier (we shall call her the “victim”) was the daughter of the Dean of the liberal arts faculty at the University of Poitiers. In the early 1870s, when she was in her twenties, the victim became a recluse in her parents’ home. She appears to have done so on her own initiative,⁴⁹ although there was talk that the family believed she had shamed them because she had had an illicit

47. George P. Fletcher, *Criminal Omissions: Some Perspectives*, 24 AM. J. COMP. LAW 703, 703 (1976) (translated by George P. Fletcher). For a somewhat different translation, see 28 AMERICAN SERIES OF FOREIGN PENAL CODES: PENAL CODE OF THE FEDERAL REPUBLIC OF GERMANY 53 (1987) (translated by Joseph J. Darby).

48. ANDRÉ GIDE, *LA SEQUESTREE DE POITIERS* 1997 (Folio paperback). Gallimard published the original edition in 1930. Gide based his study on the court records generated by the case. In stating the facts, I have largely followed his work. The published decisions in the case, as is typical of French decisions, do not recite the facts.

49. The *Chambre d'accusation*, the French equivalent of our grand jury, had dismissed false imprisonment charges against the victim’s mother.

relationship with a man or perhaps even had had an illegitimate child. At the time she became a recluse, the victim appeared to be mentally competent. Her withdrawal from the world attracted little attention, perhaps because the Monnier family had a reputation for bizarre behavior; the victim's maternal grandfather had refused to leave his room for the last ten years of his life.

The victim's mother (her father, the Dean, had died in 1882) provided the victim with adequate food; indeed, fresh oysters and foie gras were frequently on the menu. However, the mother did not provide the victim with adequate care. The police, alerted by an anonymous letter, rescued the victim in the spring of 1901. The victim, after nearly thirty years as a recluse, had become insane and lived under conditions of indescribable filth. Her bed of straw was infested with worms and her three to four feet of hair (on one side only, as the other side had been worn bald by the fetal position adopted by the victim) had become matted with excrement; in addition, putrid food and oyster shells littered the tightly shut, malodorous room where she lived. The victim's condition, publicized in photographs and etchings in the popular press, naturally aroused widespread outrage.

The defendant in the case of the Imprisoned Woman of Poitiers was not the mother—she had died several weeks after her daughter's liberation—but the victim's adult brother, Marcel Monnier, who lived in a separate house across the street from his mother's house. The local prosecutor charged the brother with what we would call an assault and battery. The applicable statute, Article 309 of the pre-1994 Penal Code, punished with a maximum term of five years imprisonment any person who "intentionally wounds or strikes, or commits any other violence or assault resulting in the impairment of the [victim's] well-being."⁵⁰ The first level trial court convicted the defendant under that article and sentenced him to fifteen months of imprisonment. The principal evidence against the defendant was the testimony of a dozen or so young women who had worked as maids for the victim's mother. They testified not only as to the victim's pitiful condition, but also as to the defendant's frequent, even daily visits to his mother's house. Evidentially, the defendant had developed the habit of reading the newspaper to his infirm and mentally ill sister.⁵¹ The turnover among the maids was high because they found working for the victim's

50. This provision dates from an 1863 amendment to the 1810 Penal Code. See 1863 Sirey *Lois Annotées* 46. It remained in effect until the adoption of the new Penal Code in 1994. For the quoted translation, see 1 AMERICAN SERIES OF FOREIGN PENAL CODES: THE FRENCH PENAL CODE 107 (1960) (translated by Jean F. Moreau).

51. There was also evidence that filthy and bad smelling conditions were to the defendant's liking. He did not empty his chamber pot for long periods of time and even forced his wife to smell its contents.

mother quite difficult. Most of them attempted to improve the care afforded the victim; some even urged their mistress to institutionalize the victim. When the authoritarian mother rebuffed their efforts, the maids chose to leave her employment. However, none of them alerted the authorities; the author of the anonymous letter appears to have been a soldier who became aware of the problem on an amorous visit to the house at the behest of one of the maids.

Marcel Monnier's conviction raised the dander of Professor Maurice E. Garçon, one of France's leading penalists at the time.⁵² Garçon, consulted by the defense, published a pamphlet criticizing the trial court's decision. According to Garçon, the language of Article 309 required that the commission of the offense by affirmative acts and did not cover the commission of the offense by omission. How could the defendant who did nothing "strike," "wound," or "commit any violence or assault?" Those verbs required an affirmative act by the defendant; therefore, Monnier's failure to rescue his sister from her plight did not violate Article 309. This reasoning convinced the Poitiers Court of Appeals (the second-level trial court) to enter a judgment of acquittal on Monnier's appeal. According to the Court of Appeals, there could be "no violence or assault without an act of violence"⁵³ After adopting this interpretation of Article 309, which precluded Monnier's conviction, the court added that Monnier's "passive resignation" and "cold indifference" deserved "the severest blame," even though it was not subject to penal sanctions.

French commentators have uniformly approved the decision by the Court of Appeals in *Monnier*.⁵⁴ Although *Monnier* is a decision by a lower court and not by France's Supreme Court (the Court of Cassation), they treat it as the most authoritative of the many cases rejecting liability for commission by omission. They agree with Garçon that basic principles of legality compel this result. Only the legislature may create criminal offenses, and the courts cannot supplement the legislature's role by filling gaps in the criminal law through reasoning by analogy. Criminal statutes, unlike their

52. Garçon was a Paris law professor and the author of a multi-volume commentary on the Penal Code.

53. For the decisions of the Court of Appeals and of the first level trial court, see CA Poitiers, November 20, 1901, 1902 D. 2 81 note Gustave Le Poittevin and 1902 S. 2 305 note Joseph Hémard. I may have taken some liberties in translating "violence" as "acts of violence," but that is plainly what the court meant. In an analogous case that arose a decade later, the Poitiers Court of Appeals clarified what it meant by saying explicitly there could be no assault without "an act of violence." See CA Poitiers, October 17, 1913, 1914 S. 2 103 unsigned note (husband not guilty of assault when he abandoned his wife on a dung heap).

54. See *supra* authority accompanying note 53.

civil counterparts, must be strictly construed for the defendant's benefit.⁵⁵ That approach to statutory interpretation applied with particular force to Monnier's case. In 1898, just three years before Blanche Monnier's liberation, the legislature had amended the Penal Code to punish persons who "deprived" children under fifteen of food or care when the deprivation endangered their health.⁵⁶ That statute did not protect disabled adults such as Blanche Monnier.

The commission of offenses by omission thus never became part of French criminal law. However, French law does recognize that negligent conduct may include either acts or omissions, and some cases where the common law would find the defendant guilty of a substantive offense because he or she had a duty to act may be prosecuted successfully in France if there is an applicable offense for which negligence is sufficient for guilt.⁵⁷ That approach, which the French courts have done little to develop, treats the defendant's omission as part of a larger course of negligent conduct.

The second gap filled by the French duty to rescue statute can be handled more quickly. In France, accomplice liability is considerably narrower than in most common law jurisdictions. To convict the defendant as an accomplice, the Code requires that the prosecution prove that the defendant had aided, assisted, or facilitated the commission of the offense.⁵⁸ That proof must include an "affirmative act"; inaction does not suffice for accomplice liability.⁵⁹ Thus, it is not sufficient that a defendant, present at the crime scene, had previously agreed to aid the primary actor, so long as no aid was actually given, or that the defendant approved the commission of the

55. This basic maxim of French law now appears in Article 111-4 of the 1994 Penal Code. Commentators have also rejected the commission of offenses by omission on the grounds that omissions do not cause proscribed results.

56. See Law of April 19, 1898, 1896-1900 Sirey *Lois Annotées* 577-85 (text of statute and legislative history). The legislative history indicates that the Parliament was responding to several well-publicized cases of child abuse; the plight of Blanche Monnier, a disabled adult, was not known to the public in 1898. The 1898 statute, however, did not impose a general duty to aid children in distress. Courts and commentators have consistently interpreted it to hold that only custodians could "deprive" children of food or care. See Le Poittevin, *supra* note 53, and CA Paris, June 15, 1951, 1951 D. 568. Parliament made that limitation explicit when it recodified the Child Abuse Statute in Article 227-15 of the 1994 Penal Code.

57. See, e.g., CA Pau, December 2, 1943, 1944 J.C.P. II 2724 note J. Seignolle (mountain guides guilty of negligent homicide when a client, whom they abandoned in an exposed location, subsequently died).

58. See Article 121-7 of the 1994 Penal Code. The comparable provisions in the former Code were Articles 59 and 60.

59. Andre Decocq, *Inaction, abstention, et complicité par aide ou assistance*, 1983 J.C.P. I 3124 (citing courts fixed interpretation of Code articles).

crime and the primary actor had become aware of that approval.⁶⁰ A common law court probably would convict the defendant as an accomplice in those situations.⁶¹

In France, the lead case exemplifying this gap once again comes from Poitiers. A farmer, knowing a dead cow to be infected, sold it to a local butcher, who proceeded to butcher the cow on the farmer's premises while other family members watched. The butcher subsequently died from the infection transmitted by the cow. The court convicted the farmer of involuntary manslaughter but ruled that the family members who silently observed the butcher's fatal mission could not be convicted of that offense, regardless of their knowledge of the danger, because they committed no affirmative act.⁶² The note accompanying the decision approved the result and found distinguishable negligent homicide convictions where drivers omitted to take precautions, such as to turn on their headlights. Those cases involved negligent conduct (i.e., driving), while in the actual case the onlookers did not engage in any conduct.

The French duty to rescue statute thus serves a dual function. In addition to punishing bad Samaritans, it fills gaps in French criminal law created by the rejection of the commission of offenses by omission and by the limitations placed on accomplice liability. Unsurprisingly, cases falling within those gaps, which do not involve a general duty to rescue, form part of the case law under the statute. For example, one of the earlier decisions under the statute convicted a mother who failed to rescue her minor child from her murderous lover.⁶³ Similarly, recent decisions have upheld convictions of social workers who have failed to rescue abused children for whom they were responsible.⁶⁴ In addition, prosecutions for failure to rescue

60. Cass. Crim., January 15, 1948, 1948 S. 1 81 note A. Légal. For some exceptional recent cases treating presence and prior agreement to aid as sufficient for accomplice liability, see Decocq, *supra* note 59.

61. See 2 L'FAVE & SCOTT, *supra* note 1, at 138-39 (accomplice liability where defendant present at crime scene and agreed to aid if necessary) and Wilcox v. Jeffery, 1 All E.R. 464 (Goddard, C.J.) (accomplice liability based on an approving presence). In addition, the Supreme Court's *Pinkerton* doctrine, holding all conspirators responsible for the substantive offenses committed by any of them in furtherance of the conspiracy, would certainly produce convictions in the former situation. See *Pinkerton v. United States*, 328 U.S. 640 (1946). France has no general conspiracy offense and nothing resembling the *Pinkerton* doctrine.

62. CA Poitiers, November 12, 1935, 1936 D.P. 2 25 note Sallé de la Marnierre. Unlike in the case of the mountain guides, there was no negligent conduct to provide the basis for the spectators' liability.

63. TC Mont-de-Marsan, January 21, 1959, 1959 J.C.P. II 11086.

64. CA Angers, July 12, 1994, 1994 G.P. 2 720 note Jacques Borneau. The *Gazette du Palais* (G.P.) is another unofficial reporter.

often involve persons whose "hearts" are with the principal offender but whom the prosecution cannot prove actually rendered any aid.⁶⁵

On the other hand, it is not clear that the duty to rescue statute would have covered Blanche Monnier's plight. It might not have, according to the leading French treatise on substantive criminal law, because the "peril" required by the statute must be an "imminent" one; thus, long-standing abuse suffered by a victim does not trigger a duty to rescue until the point in time when the abuse threatens the victim's life. Perhaps that moment had not yet arrived when the police rescued Blanche Monnier.⁶⁶ That analysis defines peril too narrowly—less than life threatening perils may qualify—but the timing question remains a difficult one in cases of continuing abuse. In a troublesome recent case, the Court of Cassation upheld the bringing of charges for failure to rescue in a case where a mother had imprisoned her daughter under conditions shockingly similar to those in the case of the Imprisoned Woman of Poitiers. The defendants in that case, to which we shall return, were the mother's lawyer and a former police officer, who was a friend of the victim and was concerned about her disappearance. Both defendants had visited the mother's house and had noticed a bad smell; while they knew the victim resided with her mother, they had never witnessed the abuse with their own eyes, as had Marcel Monnier. In the more recent case, the imprisoned daughter actually died, but it is unclear how the defendants knew of the imminent peril.⁶⁷

These abuse cases thus raise difficult questions on how far we wish to extend liability for failure to rescue. What about the maids in the case of the Imprisoned Woman of Poitiers? They were eyewitnesses to the abuse, but they did not alert the authorities when their efforts to help the victim failed. When did the victim's situation become serious enough to require their intervention? What about the amorous visitor who learned from one of the maids the explanation for the bad smell? What if he had done nothing? What about townspeople made aware of Blanche Monnier's plight through gossip spread by the maids? How do you draw lines to limit liability in a manageable fashion? In sixty years of case law, the French courts have done

65. See 1 MERLE AND VITU, *DROIT PÉNAL GÉNÉRAL*, *supra* note 46, nN485, at 614. Merle and Vitu make that point with respect to Article 223-6[1] on the duty to prevent an offense which endangers the bodily integrity of another. That offense, as we shall see, punishes failure to rescue in that particular situation.

66. MICHÈLE-LAURE RASSAT, *DROIT PÉNAL SPÉCIAL. INFRACTIONS DES ET CONTRE LES PARTICULIERS* nN 321, at 320 (1998).

67. Cass. Crim., October 30, 1990, reported with comments by Georges Levasseur in 1991 *REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ* [R.S.C.] 571 (suggesting that the Court of Cassation left the determination of those factual questions to the trial court).

little to draw those lines but have allowed prosecutors to do so as part their charging discretion.⁶⁸

III. ENACTMENT OF FRANCE'S DUTY TO RESCUE STATUTE

The duty to rescue entered French criminal law in 1941. That year was a grim one in France. Nazi troops occupied the northern and western two-thirds of the country while Marshall Pétain, who had in 1940 accepted France's defeat and agreed to an Armistice with Germany, served as head of state for the French government in Vichy. Following the Armistice, the French Parliament had gone home for the duration of the war, and Pétain exercised authority to legislate by decree. In mid-1941, German soldiers and facilities first became the targets of attack by resistance fighters, either by would-be Gaullists inspired by General de Gaulle's 1940 appeal not to surrender or by communists emboldened by Hitler's June, 1941 attack on the Soviet Union. That summer German officers were killed in Nantes and on the Paris Metro; in response, the Germans took and shot a goodly number of hostages. The Germans also pressured the Vichy government to take measures to protect the occupying forces and military facilities. The result was the decree of October 25, 1941, signed by Pétain as "Marshall of France" and "Head of the French State."⁶⁹ Plainly responding to the special circumstances of the Occupation, the decree received Pétain's assent because Vichy authorities believed it preferable to try offenders charged with violating the decree in the French courts rather than leave them to the tender mercies of the German military authorities.

The decree of October 25, 1941 had for its principal objective the punishment of "culpable omissions."⁷⁰ To accomplish that purpose, the decree defined three new offenses, each punishable by a maximum of five

68. These line-drawing problems led the California Supreme Court to declare unconstitutional a statute which punished as a felon "any person who willfully causes or permits an elder or dependent adult to suffer unjustifiable physical pain or mental suffering." *People v. Heitzman*, 886 P.2d 1229 (Cal. 1994). In *Heitzman*, the defendant was the daughter of the deceased victim; the victim lived with her sons, but the daughter often visited. The court held that the non-resident daughter had no duty to act under the common law and that the legislature's effort to impose such a duty on any person was unconstitutional because it afforded neither potential defendants nor law enforcement officials fair notice when inaction violated the statute. To emphasize the statute's vagueness, the court asked whether a delivery person who did nothing after spotting (or smelling) the victim would have violated the statute. *Id.* at 1235.

69. See 1941 *Sirey Lois Annotées* 749.

70. André Tunc, *Ordonnance n. 45-1391 du juin 1945*, 1946 D. Lég. 33. Tunc's article analyzes both the 1941 decree and the 1945 decree reenacting most of its provisions.

years imprisonment: first, the failure to report certain felonies and misdemeanors; second, the failure to prevent the perpetration of these offenses; and third, the failure to render assistance to persons in peril.⁷¹ The duty to report applied to a long list of felonies and misdemeanors which Professor Tunc, writing after the war's end, aptly summarized under the heading "Attacks Against the Personnel and Military Facilities of the Occupying Army."⁷² The duty to prevent offenses, on the other hand, covered the same list of offenses but applied only if a person could intervene "without injury or risk to himself or his loved ones."⁷³ The decree also exempted certain relatives of the offender from the duty to report but not from the duty to prevent the commission of an offense.

The third and final omission punished by the 1941 decree—the failure to render assistance to a person in peril—similarly applied only if the rescuer could intervene without risk. The decree did not define peril but required for the offense that the person in peril actually suffer death or serious bodily injury. This limitation prompted one of the new law's chief commentators to conclude that the decree punished what French law had previously left unpunished: the commission of offenses by omission.⁷⁴ Less happily, the same commentator writing during the Occupation suggested that recognition of a duty to rescue was attributable "to a tightening of social solidarity and the dawning of a new authoritarian penal law."⁷⁵ Indeed, both Hitler's Germany and Mussolini's Italy had either enacted duty to rescue statutes or, in the case of Italy, had greatly strengthen the preexisting statute.⁷⁶ More to the point, a post-war commentator criticized the decree's vision of social solidarity; for that commentator, the paradigmatic case

71. The decree also contained new and complex provisions punishing the receiving of offenders.

72. See Tunc, *supra* note 70, at 37. Prior to this decree, the only general law imposing a duty to report was Article 475 of the 1810 Penal Code, repealed by the liberal Orleanist Parliament in 1832. That law required all persons to report threats to the internal or external security of the State. Its repeal provoked much popular rejoicing. That response reflects the general dislike of the French for informers. 1 MERLE AND VITU, *DROIT PÉNAL GÉNÉRAL*, *supra* note 46, n. 504, at 382-83.

73. See *id.*

74. H. Donnedieu de Varbes, *Loi du 25 Octobre 1941*, 1942 D.C. Lég. 33, 34.

75. See *id.* at 33.

76. For the German duty to rescue statute enacted in 1935, see John P. Dawson, *Negotiorum Gestio: The Altruistic Intermeddler*, 74 HARV. L. REV. 1073, 1101-08 (1961) (second installment of article). The statute punished refusals to aid "in cases of accident, common danger, or necessity where there is a duty to aid according to the sound sense of the people [*gesundes Volksempfinden*]." *Id.* at 1102. For the Italian statute, see Cadoppi, *supra* note 2, at 111-15.

covered by the duty to rescue was that of the French citizen who discovered a wounded German officer.⁷⁷

Remarkably, the decree of October 25, 1941, or most of it, survived the demise of Vichy France. The Vichy government, according to the Gaullists, was illegal and DeGaulle's post-war Provisional Government annulled most Vichy measures. The decree of October 25, 1941 did not suffer that fate; a decree of June 25, 1945, while technically invalidating the earlier decree, enacted its provisions in modified form for incorporation into the Penal Code.⁷⁸ Once again there was no legislative debate or parliamentary vote because the Provisional Government exercised emergency powers to give its decree the force of law.

This post-war ratification of an unpopular Vichy decree aimed at suppressing internal resistance to the Germans is hard to explain, to say the least. Its principal architect was François de Menthon, a former law professor and devout Catholic serving in 1945 as DeGaulle's Attorney General. We do not know de Menthon's reasons for proposing the new decree, but we do know that as a law professor he would have been familiar with an oft-cited book written on the 1941 decree by a rising young law professor named André Tunc.⁷⁹ In that book, Tunc argued that the 1941 decree, although imposed by the German occupiers, did fill some unfortunate gaps in French criminal law. Tunc thus favored preserving those provisions in the 1941 decree which were consistent with French Republican values. With respect to the duty of rescue, Tunc argued that the draft Penal Code proposed in 1934 had contained a similar provision. The proposed Code never became law—the French Parliament faced too many crises in the late 1930's to engage in much law reform—, but the serious consideration given to the draft Code convinced Tunc and many other French jurists that the duty to rescue was acceptable as a good French idea and need not be rejected as a Nazi aberration.

The 1945 decree adopted Tunc's approach by separating the wheat from the chaff, in other words, by preserving what was good in the 1941 decree while pruning the excesses. One of the excess deleted in 1945 was a provision applicable to the receiving offenses which allowed judges in "serious cases" to impose penalties in excess of the statutory maximum. Likewise, the new decree narrowed the duty to report to cover only the most serious offenses or *crimes*, a category of offenses often translated as felonies but in reality much narrower than the felony category in most common law

77. See the note by André Touleman to TC Nancy, January 2, 1965, 1965 G.P. 1 97.

78. For the text of the 1945 decree, see 1945 D. Lég. 130.

79. ANDRÉ TUNC, *LE PARTICULIER AU SERVICE DE L'ORDRE PUBLIC* (1943).

jurisdictions. The new decree also limited the duty to prevent an offense to offenses that threatened the victim's bodily integrity. On the other hand, it broadened the liability for failure to assist a person in peril by eliminating the requirement that the person in peril actually suffer death or grievous bodily injury. This broadening is probably attributable to a desire for consistency. The 1941 decree had not treated the occurrence of the proscribed result as an element of the offense of failure to prevent an offense. The 1945 decree adopted the same approach for the failure to rescue. According to Professor Tunc, who seemed to approve the change in his commentary on the 1945 decree, failure to prevent a felony was a particular example of the more general failure to rescue a person in peril.⁸⁰ The common theme of all these provisions was, as suggested by the preamble to the 1945 decree and by the title to Professor Tunc's book, that the private citizen has a duty to participate in the preservation of public order.

The three offenses of omission created in the 1940's by the Vichy and Gaullist governments remain part of French law today. Largely unchanged, their inclusion in the 1994 Penal Code raised little controversy.⁸¹ Of the three offenses, the failure to render assistance has experienced the most spectacular developments. From the very beginning, it was the subject of "frequent"⁸² and "unexpected"⁸³ applications; in recent decades, it has regularly produced one to three hundred convictions per year.⁸⁴ On the other hand, both the duty to report and the duty to prevent offenses have fallen into comparative desuetude. With respect to the former duty, the courts' strict interpretation has so narrowed the offense that it retains "little significance."⁸⁵ According to the case law, the duty to report—only

80. See Tunc, *supra* note 70, at 36.

81. In the 1994 Code, the duty to report (Article 434-1) appears with the offenses affecting the administration of justice, while the duty to prevent offenses (Article 223-6[1]) and the duty to rescue (Article 223-6[2]) appear with the offenses against the person. The prior Code had placed all three articles with the general provisions at the beginning of the Code.

82. See the note by P.A. Pageaud to CA Aix, December 23, 1952, 1953 J.C.P. II 7429.

83. See *id.* See also Jean Larguier, *Rigueur pénale et protection de l'enfance*, 1955 D. Chr. 43, 47 (the duty to rescue offense is a "dangerous weapon" applied in all sorts of "unexpected situations").

84. The year 1966 year produced 115 convictions. JEAN-HENRI SOUTOUL, *LE MÉDECIN FACE À L'ASSISTANCE À PERSONNE EN DANGER ET À L'URGENCE* 130 (1991). During the 1970s, 1980s, and early 1990s, the total gradually rose to at least 300. See MINISTÈRE DE LA JUSTICE, *ANNUAIRE STATISTIQUE DE LA JUSTICE* (1971-1999). In 1996 and 1997, the last two years for which statistics are available, that number skyrocketed to 959 and 1208 convictions respectively. *ANNUAIRE STATISTIQUE DE LA JUSTICE* (1999) 143.

85. See 1 MERLE AND VITU, *DROIT PÉNAL SPÉCIAL*, *supra* note 9, nN 505, at 384 ("*peu de chose*").

applicable to the most serious offenses or *crimes*⁸⁶—does not include a duty to identify the offender.⁸⁷ In addition, reporting an offense is mandatory only if it would be “useful” in preventing or limiting the effects of the offense or the commission of new offenses. With respect to completed offenses, courts have sustained convictions for non-reporting in situations where stolen property remained unrecovered, but they have not developed any case law on when reporting is required to prevent future offenses. Finally, the courts have generously interpreted the exemptions from the duty to report afforded family members.⁸⁸

The situation is very similar with respect to the duty to prevent offenses. That provision has been “rarely applied.”⁸⁹ This atrophy is attributable to at least two factors. First, courts have interpreted the duty to prevent offenses not to cover situations where the government charges that a defendant could have prevented an offense by reporting it to law enforcement authorities; according to the courts, the legislature had addressed the duty to report in a separate, much narrower article.⁹⁰ Second, the statutory text requires that the defendant “is able” to prevent the commission of the offense. How many persons are likely to be able to prevent the commission of a serious offense without seeking aid from law enforcement authorities? Not very many, I would think. Certainly the eyewitnesses to Kitty Genovese’s murder could not have prevented it without assistance from the police. Given these factors, it is not surprising that the few reported cases on the duty to prevent have tended to involve family members presumed to have some control over the offender. Thus, in the lead case, the Court of Cassation upheld the conviction of a husband for not

86. In 1954, the legislature enacted a new special offense imposing a duty to report child abuse to the appropriate judicial or administrative authorities. *See* the law of April 13, 1954, 1954 *Sirey Lois Annotées* 577-85, codified as Article 62-2 of the former Penal Code. The 1994 Penal Code expanded that offense to require reporting of abuse inflicted on a broader range of vulnerable persons. *See* Article 434-3. That article, unlike the general duty to report article, does not exempt family members from the reporting requirement.

87. The lead case is *Cass. crim.*, March 2, 1961 (*Seggiaro*), *supra* note 27 (a hotel receptionist had no duty to identify a fleeing burglar; the duty to report ends once authorities are aware of the offense).

88. For the narrow range of cases covered by the duty to report, *see* 1 MERLE AND VITU, *DROIT PÉNAL SPÉCIAL*, *supra* note 9, nN 505, at 383-85.

89. *See* note by Pierre Bouzat to the lead case (*Ginguené*) in 1960 D. Jur. 150 (commenting on *Cass. crim.*, December 17, 1959).

90. *See* the comments by Yves Mayaud on *Cass. crim.*, November 27, 1996, 1997 R.S.C. 379. *See also* *Cass. crim.*, November 7, 1990, 1990 D. I.R. 295 and 1991 R.S.C. 569 obs. Georges Levasseur (no violation of duty to prevent when police officer failed to report an armed robbery planned by his brother-in-law). The duty to report is narrower than the duty to prevent because it covers fewer offenses and exempts many close relatives of the offender.

preventing his wife and son from torching the family business.⁹¹ On the other hand, a wife (presumably less strong) was convicted not for failure to prevent an offense, but for failure to rescue when she allowed her husband to have sexual relations with their adopted daughter.⁹²

IV. OFFENSE OF FAILURE TO RESCUE

The duty to rescue, unlike the duty to report and the duty to prevent offenses, has been broadly interpreted by the courts. The offense, as defined by the statutory text,⁹³ has four basic elements. First, there must be a person in peril. Second, the defendant must fail to render assistance, either by intervening personally or by calling for aid. Third, the defendant must have been able to render that assistance without risk to himself, herself, or others. Fourth, the defendant's failure to render assistance must be intentional. As we shall see, the fourth or mental element, defined by the courts to require that the defendant have knowledge of the peril, has served as the principal limitation to the expansion of the duty to rescue. Even that limitation has often proved ineffective. In many situations, the courts have allowed convictions where the defendant was merely negligent, or in other words, that he should have known the extent of the peril.

A. First Element: Person in Peril

On the first element of the offense, the Code defines neither "person" nor "peril." The definition of "person" has posed few problems. Rather reluctantly the courts have held that a corpse is not a person. Thus, there can be no conviction if the person in peril was already dead when the defendant failed to render assistance, regardless whether the defendant was aware of the death. Under this interpretation, a trial court, although appalled by the defendant's "immoral conduct," acquitted a hit and run driver who had instantly killed the victim and then sped away without making any inquiries

91. See the note on the lead case of *Ginguené*, *supra* note 89. In the accompanying case note, Pierre Bouzat criticizes that result. He cites the findings of the trial court to argue that the husband was too weak-willed to prevent his domineering wife from committing the arson. For a clearer case of guilt, see TC Auch, July 26, 1949, 1949 REC. DROIT PÉNAL 43 (the father easily could have prevented a murder by his weak-minded son).

92. Cass. crim., March 31, 1992, 1994 R.S.C. 332 obs. Georges Levasseur. The wife easily could have aided the victim, not by preventing the offense through personal intervention but, as explicitly recognized by the duty to rescue statute, by reporting the victim's peril to the authorities.

93. See *supra* text accompanying note 30.

about the victim's condition.⁹⁴ The Court of Cassation subsequently upheld that interpretation, agreeing with a lower court that a material element of the offense is missing if the victim was dead.⁹⁵ The result has received the approval of commentators, who nevertheless recognize that it is inconsistent with the generally accepted purpose of the new offense to punish "callous indifference" and "excessive egotism."⁹⁶ That purpose must yield, according to these commentators, to the basic principle of legality and to French law's unwillingness to punish actors for attempting the impossible.⁹⁷

On the other hand, the courts have treated both the fetus⁹⁸ and dying persons⁹⁹ (i.e., persons whom assistance could not save) as "persons" in peril. With respect to the subsequent conclusion, courts and commentators have argued that the duty to rescue does not include a requirement of successful rescue. What is criminal is not the failure to accomplish a successful rescue but the failure to try. In addition, they have reasoned that one can render assistance to a dying person by the consolation of one's presence. As recognized by the Court of Cassation in the lead precedent, it violates "the duty of humanity" to abandon a dying person.¹⁰⁰

The definition of "peril" has proved more difficult to ascertain. It is widely assumed that the only types of peril covered by the offense are those likely to cause death, serious bodily injury, or serious impairment to physical health¹⁰¹. However, the only authority for this proposition is a lower-court decision which is based on rather unusual facts. In that case, a trial court acquitted a doctor who had refused to perform an abortion; the court held that the woman's mental distress—based on her belief she had already had all of

94. TC Poitiers, October 25, 1951, 1952 J.C.P. II 6932 note P.A. Pageaud.

95. Cass. crim., February 1, 1955, 1955 J.C.P. II 8582 note P.A. Pageaud and 1955 D. Jur 384.

96. For the origins of those phrases, *see supra* text accompanying note 27.

97. *See especially* the notes by P.A. Pageaud to the cases cited in *supra* notes 94, 95.

98. Cass. crim., April 2, 1992, 1992 G.P. 2 608 note J.P. Doucet.

99. Cass. crim., March 23, 1953, 1953 D. Jur. 371 and 1953 J.C.P. II 7584.

100. *See id.* For a good summary of the arguments for including dying persons within the statute, *see* the note by P.A. Pageaud, to Cass. Crim., February 1, 1955, *supra* note 95.

101. *See* Rassat, *supra* note 66, at nN 321, at 320. EMTALA similarly defines an "emergency medical condition" as a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) that the absence of immediate medical attention could reasonably be expected to result in:

- i) placing the health of the person in serious jeopardy, or
- ii) serious impairment to bodily functions, or
- iii) serious dysfunction of any bodily organ or part.

42 U.S.C. '1395dd (e) (1) (A) (West 1999). For another provision defining woman in labor, *see id.* at '1395dd (e) (1) (B).

the children that she possibly could raise—did not qualify as a “peril.”¹⁰² The facts were unusual because the defendant, a prominent opponent of abortion, had been set-up by abortion proponents who brought the woman to his office as part of a test case to challenge doctors who refused to perform abortions on grounds of conscience, as permitted under France’s newly enacted abortion law. The doctor’s conscientious objections to abortion prevailed in this case, but the commentators wondered whether they would have prevailed if the pregnancy had posed a genuine risk to the woman’s life or physical health.¹⁰³ French law has not yet resolved that question.

There are no similar uncertainties over the source of the peril threatening the victim. Courts have broadly interpreted “peril” to cover perils created by third-party wrongdoers, by natural events, by the victim’s illness, by the fault of the defendant, or even by the victim’s own fault.¹⁰⁴ Thus, a person attacked by robbers is in peril, as is the victim of a fire, a heart attack, or the defendant’s negligence. More importantly, self-induced perils qualify; it does not matter that the cause of the peril was the victim’s imprudence, self-intoxication, or intention to kill or injure himself or herself. The only unresolved question concerns perils caused by the defendant’s intentional and unjustifiable wounding of the victim. On this issue, at least one lower court, after convicting a defendant for intentionally wounding the victim, acquitted him for failing to rescue the victim by leaving the victim to bleed to death.¹⁰⁵ The court reasoned that the legislature did not intend to punish intentional wrongdoers for abandoning their victims.¹⁰⁶ That reasoning did not convince the author of a critical case note accompany that decision. According to that author, since the legislature punished failure to rescue more severely than most forms of intentional wounding, why should the defendant not suffer the more severe penalties for failure to rescue if the defendant abandoned the intentionally wounded victim in a situation of peril?¹⁰⁷ The Court of Cassation has avoided resolving this issue.¹⁰⁸ On the other hand, it appears reasonably clear that a burglar justifiably shot by a

102. T.C. Rouen, July 9, 1975, 1976 D. Jur. 531 note G. Roujou de Boubée and 1976 J.C.P. II 18258 note René Savatier.

103. *See id.*

104. *See* Rassat, *supra* note 66, n.320, at 318-320.

105. CA Douai, September 30, 1954, 1955 D. Jur. 55 note P.A. Pageaud.

106. *See id.*

107. Of course, if the victim of the intentional wounding dies, the defendant is most likely guilty of involuntary homicide. However, the maximum penalty for involuntary homicide (three years) is less than the maximum penalty for failure to rescue (five years).

108. Cass. crim., February 19, 1959, 1959 D. Jur. 161 note M.R.M.P.

homeowner may qualify as a person in peril; the aggrieved homeowner is therefore subject to a duty to rescue.¹⁰⁹

Courts have been less successful in defining the gravity of the required peril. As early as 1949, the Court of Cassation did develop a formulaic interpretation of "peril," which the courts have regularly regurgitated in subsequent cases. According to the 1949 decision, the peril must be "imminent, patent, and requiring an immediate intervention."¹¹⁰ That formula, however, focuses on the timing question of when the defendant must intervene and provides little enlightenment on how serious the peril must be to require intervention. On the timing question, the formula suggests that a victim's situation reaches the level of "peril" at a particular moment in time; at that moment, when the peril becomes "imminent" and when "immediate" intervention is necessary to dissipate it, the duty to rescue arises.¹¹¹ Thus, a conscious drunk is not in peril when sleeping in a haystack by the side of the road,¹¹² but is in peril upon falling into a stream¹¹³ or when behind the wheel of a motor vehicle. Oftentimes, it is difficult to determine the exact moment the duty arises, as in the case of a woman who died from a prolonged fast. In that case, the Court of Cassation upheld the defendant's conviction because, although she was aware of the victim's condition earlier, she did not notify the authorities until it was too late to save the victim.¹¹⁴ On the other hand, the same Court has held that institutionalized mental patients are not in peril. Therefore, a nurse did not violate the duty to rescue by going

109. CA Bourges, March 6, 1958, 1958 D. Jur. 279 (failure to summon a doctor is a "particularly grave" violation of duty to rescue).

110. Cass. crim., May 31, 1949, 1949 J.C.P. II 4945 note Joseph Magnol, 1949 S. 1 126 and 1949 D. Jur. 347.

111. The Court of Cassation's formula undermines any argument that the peril must arise suddenly and unexpectedly, although some case law supports that approach. See CA Paris, July 8, 1951, 1952 D. Jur. 582 (a woman enduring a natural childbirth is not in peril). That case seems better understood as a case where the defendant doctor had rendered all the assistance required by telling the pregnant woman in advance that he would not deliver her child at home and by instructing her to make arrangements with a clinic.

112. TC Villefranche-sur-Saone, March 17, 1953, 1953 D. Jur. 417. The defendant had found the drunk in a ditch, woke him up, and left him in a haystack with a blanket. The drunk froze to death. The trial court acquitted the defendant.

113. CA Caen, November 14, 1990, cited in Jean-Luc Fillette, *L'obligation de porter secours à la personne en péril*, 1995 J.C.P. I 3868, at page 352 n. 35.

114. Cass. crim., April 11, 1964, 1964 D. Somm. 58 and 1964 G.P. 2 147.

on strike, even though one of her patients died during the strike from drinking milk which the patient should not have drunk.¹¹⁵

The only further guidance from the Court of Cassation on what constitutes a peril is the Court's recognition that an apparent peril suffices. This approach derives from the lead 1954 case of *Dr. T*—the *bête noir* of the medical profession, as we shall see—where police officers discovered a young man twisting in pain on the road.¹¹⁶ A police officer reported the victim's plight to the doctor on duty, who refused to accompany the officer to assist the young man. In fact, although not known to the officer or the doctor, the victim had recently undergone surgery for a knife wound; the wound's healing was causing him severe pain which, however, soon went away without medical treatment. The Court of Cassation nevertheless upheld the defendant's conviction on the basis of the victim's apparent peril. This result seems inconsistent with the Court's earlier holding that a corpse is not a person in peril. How can there be a person in peril when there is a living person but no actual peril, but no person in peril when, unbeknownst to the defendant, the peril has already killed the victim?

The lower courts have found a peril not only when there is a danger of death or serious bodily injury but also when there is a danger to physical health. In many of these cases, however, the defendant's response to the situation seems to have been inappropriate for reasons other than the indifference and egoism condemned by the statute. The most notorious case is a trial court decision convicting a doctor who refused to respond to a father's personal appeal to make a home visit to treat his flu stricken son. The doctor's motivations for refusing were political; the father was a trial judge who had recently convicted several demonstrators whom the doctor supported. The court found that the doctor had made it clear to the judge that he would not treat the sick son—the son suffered no harm from the resulting delay—because the doctor disliked the judge's rulings.¹¹⁷ Similarly, a court convicted a bartender for refusing to summon rescue services requested by

115. Cass. crim., January 13, 1955, 1955 J.C.P. II 8560 note P.A. Pageaud. The bemused commentator to this decision wonders who would have thought of applying the duty to rescue in this situation.

116. Cass. crim., January 21, 1954, 1954 J.C.P. II 8050 note Paul-Albert Pageaud. For further discussion of the "apparent peril" standard, see Alain Guillon, *L'omission de porter secours (Article 63-2 du Code Pénal) et la profession médicale*, 1956 J.C.P. I 1294.

117. TC Charleville, February 6, 1952, 1953 J.C.P. II 6987 note P.A.P. See also the lead case of *Dr. T*, *supra* note 116, where the doctor refused to render assistance because the person in peril was an Arab.

a patron who had suffered a superficial knife wound.¹¹⁸ The accompanying case note to the court's decision suggests that the bartender did not call emergency services because he believed their arrival would be bad for business. For the court, however, the peril was sufficient even though it was not life threatening. Finally, in a more recent case, a trial court convicted social workers who failed to arrange for a medical examination of a sexually abused boy under their supervision; it was not sufficient that the defendants had removed from the victim's foster home the older boy responsible for the abuse.¹¹⁹ The Court of Appeals observed that the defendants were more concerned over making arrangements for the end of the year holidays than in attending to the needs of the abused boy.¹²⁰

Most post-1954 decisions finding a peril are in reality applying the duty of inquiry created by the Court of Cassation when interpreting the mental element required for the offense. The Court first formulated that approach in its 1954 *Dr. T* decision involving the doctor summoned to treat the young man twisting in pain,¹²¹ but has also applied it, at least on occasion, in cases involving laypersons and eyewitnesses. Under this approach, a defendant who knows he or she is not fully informed about a potential peril cannot summarily reject an appeal for assistance on the grounds that there is no peril requiring the defendant's immediate personal intervention. In other words, the defendant who does not adequately investigate the situation cannot claim lack of knowledge of any peril. Thus, the doctor in the *Dr. T* case could not know whether the young man twisting in pain was in peril without making further inquiries, such as by actually examining the young man. This approach, combined with the focus on 'apparent' rather than 'real' perils, allows the courts to avoid determining in most cases what constitutes a sufficient peril. Absent a situation that is plainly benign, defendants—certainly defendants who are health care professionals—who do not investigate a potential peril face conviction.¹²² We will discuss later what the duty to inquire entails.

The potential suicide provides a final problem in defining "person in peril." A recent trial court decision held that a competent adult not suffering from depression or other distress who had decided to kill herself was not in

118. CA Paris, May 29, 1970, reported with Cass. crim., March 20, 1972, 1973 J.C.P. II 17474 note Lise Moret (upholding bar's civil liability).

119. CA Angers, July 12, 1994, *supra* note 64.

120. *See id.*

121. *See supra* text accompanying note 116.

122. *See* Guillon, *supra* note 116, at n25. Guillon only analyzes the liability of members of the health care professions. For an analysis whether the duty of inquiry applies to laypersons, *see* text accompanying notes 178 to 184, *infra*.

peril because she was not in need of any assistance.¹²³ That decision, in the opinion of the author of the accompanying case note, is a bit “revolutionary”; most courts and commentators continue to treat persons threatening to kill themselves as persons in peril,¹²⁴ at least if the threat is sufficiently imminent.¹²⁵ However, courts have found that a doctor’s failure to render assistance is justifiable if the person in peril refuses medical treatment.¹²⁶ To invoke this defense, the doctor must have fully informed the person in peril of the benefits of the treatment.¹²⁷

The traditional approach to suicide as a peril received dramatic confirmation when the Court of Cassation upheld the conviction for failure to rescue of one of the authors of the controversial book, published in 1982, entitled *Suicide: Mode d'emploi (Suicide: How to Do It)*.¹²⁸ That book, which gave specific instructions on how to kill oneself, facilitated several suicides in France. Surviving family members successfully clamored for the prosecution of its authors and publisher.¹²⁹

Courts subsequently acquitted the defendants in cases where there was no “dialogue” between the defendants and the individual who committed suicide.¹³⁰ However, the Court of Cassation affirmed a conviction in a case where the person who committed suicide, Bonnal, had written one of the authors, Le Bonniec, for more specific information on the necessary dosage.¹³¹ Le Bonniec supplied the requested information by letter, and Bonnal used that information roughly five weeks later to kill himself. The trial court, in convicting Le Bonniec, reasoned that Bonnal’s two detailed letters amply demonstrated that Bonnal was in peril and that the defendant’s failure to assist in saving Bonnal’s life “violated the duty of humanity which

123. TGI Paris, January 25, 1984, 1984 D. Jur. 486 note Danièle Mayer. The case was a civil suit brought by the suicide victim’s survivors.

124. See SOUTOUL, *supra* note 84, at 185-89 and accompanying authorities.

125. See, e.g., Cass. crim., April 23, 1971, D. Somm. 121 (father did not violate duty to rescue as son’s talk of killing himself did not satisfy imminence requirement).

126. Cass. crim., January 3, 1973, 1973 D. Jur. 220 and SOUTOUL, *supra* note 84, at 195-209.

127. CA Toulouse, February 15, 1971, 1972 G.P. I Somm. 35 (doctor convicted because he had not reiterated patient’s need for tetanus shot).

128. Cass. crim., April 26, 1988, 1990 D. Jur. 479 note Henri Fenaux.

129. Jacques Borricand, *La répression de la provocation au suicide: de la jurisprudence à la loi*, 1988 J.C.P. I 3359. At the time of the book’s publication, neither suicide nor provoking another to commit suicide was an offense in France. The only offense with which the defendant could be charged was failure to rescue.

130. See the note by Bertrand Calais to TC Paris, November 20, 1985, 1986 D. Jur. 369.

131. See *supra* note 128. For the trial court’s decision, see *supra* note 130.

the charged offense embodies.”¹³² In upholding that conviction, the Court of Cassation explicitly recognized that the defendant committed the offense, not by sending the letter of instructions, but by failing to aid Bonnal, either by seeking to dissuade him from ending his life, or by contacting persons or associations who might have intervened to save Bonnal's life. Parliament responded to this controversy by amending the Penal Code to make incitement to commit suicide an offense.¹³³ The new offense requires some affirmative act by the defendant, an act which affects the victim's will.¹³⁴ It remains unclear to what extent the new offense supersedes the failure to rescue, but it does seem a more appropriate response to the problem of the potential suicide by a competent person.

B. Second Element: Non-assistance

On the second element of the defendant's failure to render assistance, the text defining the offense seemingly offers the defendant the choice between intervening by “acting personally” or by “calling for aid.” Read literally, that language exonerates the defendant who responds to the peril by reporting it to the persons or authorities responsible for rendering assistance, for example, the police or a local rescue unit. The courts, however, have never afforded the defendant such a safe haven; they have always insisted that the defendant respond to a known peril in an appropriate fashion. While the assistance rendered need not be effective in the sense of actually rescuing the person in peril, it must be a reasonable response, given the necessities of the situation. Thus, in one of the first cases applying the failure to rescue statute, a trial court convicted and sentenced to three years in prison a defendant who ran to call for aid rather than tender a pole to his drowning son-in-law.¹³⁵ The court reasoned that the defendant personally could have aided the son-in-law without risk to himself, as demonstrated by the fact that another eyewitness promptly rescued the victim by tendering him the pole.¹³⁶

The Court of Cassation subsequently confirmed that a defendant, confronting a person in peril, does not have an arbitrary choice between calling for aid or personally intervening. Rather, the defendant must render

132. For the facts, see the lengthy note by Bertrand Calais to TC Paris, November 20, 1985, *supra* note 130.

133. Law number 87-1133 of December 31, 1987, now codified as Articles 223-13 to 223-17 of 1994 Penal Code.

134. TGI Lille, April 3, 1990, 1993 D. Somm. 14 obs. Azibert (handing a knife to a person threatening to kill himself is not an incitement to commit suicide).

135. TC Aix, March 27, 1947, 1947 D. 304 and 1947 J.C.P. II 3583 note R.B.

136. See *id.*

assistance by the "method which necessity commands," which may include both calling for aid and personally intervening.¹³⁷ As recognized by commentators, this approach requires that the defendant respond to a peril in an appropriate fashion, that is to say, respond as would a reasonable person in the defendant's situation.¹³⁸ In other words, knowledge of the victim's peril is an element of the offense, but knowledge as to the ineffectiveness of the defendant's response is not. Thus, the defendant's good faith in seeking to render assistance is not sufficient to escape liability; the standard is one of reasonableness.¹³⁹

The lead case rejecting the arbitrary choice approach dates from 1956. The defendant, driving an automobile with three passengers, stopped at the scene of an accident which blocked the road. Two accident victims—soldiers who were in uniform—were lying on the side of the road bleeding rather badly. The police had not yet arrived, but others at the scene asked the defendant to transport the soldiers to a nearby hospital. The defendant refused on the grounds that his car was already full, and sped away after making a U-turn. However, in the next town he stopped to notify the police, which he had promised the onlookers that he would do. Meanwhile, another car arrived at the accident scene; this time the driver acceded to the onlookers' request to transport the wounded soldiers to the hospital, where they received treatment for their injuries. There was no evidence that the brief delay in arriving at the hospital had in any way worsened the soldiers' condition.

The trial court nevertheless convicted the defendant and sentenced him to two months suspended and a fine of 50,000 francs.¹⁴⁰ The court reasoned that the legislature had given the rescuer a choice between calling for aid and personal intervention because the legislature could not know in advance which method would be appropriate in each particular case.¹⁴¹ In this case, the defendant's leaving the accident scene to summon help had violated the statute because he had not made the choice "required by the circumstances."¹⁴² The court further opined that personal intervention was

137. Cass. crim., July 26, 1954, 1954 D. Jur. 666.

138. See especially the preface by Professor Pierre Couvrat in SOUTOUL, *supra* note 84, at 10 (standard of "*le bon professionnel*" or "*le bon père de famille*") and the note by Professor Pierre Bouzat to Cass. crim., December 17, 1959, 1960 D. Jur. 398.

139. See *id.*

140. TC Bayeaux, June 22, 1954, 1954 J.C.P. II 8290 note P.A.P. and 1954 D. Jur. 603. The Court of Cassation upheld the conviction. Cass. Crim., October 9, 1956, 1956 J.C.P. II 9598.

141. See *id.*

142. See *id.*

the preferred method of rescue; summoning aid was appropriate only if the defendant's personal intervention posed a risk to the defendant or the rescue required special skills not possessed by the defendant.¹⁴³ In upholding the defendant's conviction, the Court of Cassation did not repeat the lower court's preference for personal intervention but did formulate a general rule requiring the defendant to act reasonably under the circumstances in choosing the method or methods for rendering assistance.¹⁴⁴ Recently, the Court of Cassation applied that rule to uphold the conviction of a motorist who, upon narrowly missing a young accident victim flagging down vehicles on a superhighway, chose to contact the police from the next rest area rather than to intervene personally to rescue the child by pulling onto the shoulder.¹⁴⁵

Courts have applied similar rules to convict defendants whose response to a peril, while neither indifferent nor egotistical, was different than that of a reasonable person. For example, parents violated the duty to rescue when in accordance with their religious beliefs they prayed for the recovery of their seriously ill child and did not seek medical attention.¹⁴⁶ The parents' belief in the efficacy of prayer to save their child, whom they knew to be seriously ill, was irrelevant because, according to the court, it was merely their "motive" for not rendering more effective assistance.¹⁴⁷ Likewise, a faith healer violated the duty to rescue when he practiced his calling on a sick child and did not persuade the parents, as the court believed he was able to do, to seek medical attention for the child.¹⁴⁸ On the other hand, parents do not violate the duty to rescue if they lack the intelligence to know that their child needs medical attention.¹⁴⁹

Finally, at least until recently, courts have brushed aside as "dilatory measures," not qualifying as the assistance required by law, a doctor's informing a person in peril—or else informing the persons acting on the

143. *See id.*

144. Cass.crim., October 9, 1956, *supra* note 140.

145. Cass. crim., March 7, 1991, 1992 R.S.C. 82 obs. Georges Levasseur. The Court did not specify what the defendant driver should do once he pulled over on the shoulder.

146. CA Grenoble, April 9, 1954, 1954 J.C.P. II 8139 note P.A. Pageaud and 1954 D. Jur. 375 unsigned note. For a clearer case of guilt, *see* TGI Seine, May 11, 1965, 1965 D. Somm. 115 (religious sect allowed an old man to die without proper care).

147. *See* CA Grenoble, *supra* note 146.

148. CA Angers, December 19, 1963, 1965 D. Somm. 23.

149. Cass.crim., June 29, 1967, J.C.P. 15377 note Jean Pradel. Similarly, faith healers do not violate the duty to rescue when they minister to patients whom the medical profession acknowledges it cannot save. TC Orleans, November 29, 1950, 1951 D. Jur. 246 note André Tunc and 1951 J.C.P. II 6195 note Jean Larguier.

person in peril's behalf—to contact someone else, or prescribing some treatment over the telephone for the person in peril.¹⁵⁰ While in some of these cases the convicted doctor may have acted with the indifference or egoism required for the offense—for example, by brusquely telling a former patient to contact her new doctor without any knowledge on the new (and more remote) doctor's availability¹⁵¹—, doctors have rightfully complained that the only way they could avoid a conviction, once summoned to assist a person in peril, was to examine that person, even if that examination involved going to an accident scene or making a home visit.¹⁵² As we shall see when analyzing the required mental element, in the 1980's and 1990's courts have become more flexible in judging the appropriateness of a doctor's response to a call for aid, but they still treat as a “dilatory measure” a doctor's responding to serious sounding symptoms by prescribing treatment over the telephone.¹⁵³

C. Third Element: No Risk

On the third element—the risk posed by the rescue—the statutory text is quite clear: there can be no offense unless the would-be rescuer can call for aid or personally intervene “without risk” to the rescuer or third persons. Taken literally, the quoted phrase would in effect vitiate the duty to rescue. Every rescue, as recognized by the law's early commentators,¹⁵⁴ involves some risk. Even the strongest of swimmers may drown, or more likely, suffer a sprain or some scratches, in rescuing that proverbial drowning child. Not surprisingly, courts have not taken the text literally, but they have done little to define what risks a rescuer must assume. A recent commentator understands the case law to interpret “risk” to cover not all risks, but only those risks which would deter from intervening “a reasonable and well-intentioned person placed in the same circumstances.”¹⁵⁵ This reasonableness approach, which takes into account the would-be rescuer's personal circumstances, requires professionals, such as police officers and

150. See, e.g., Cass. crim., February 20, 1958, 1958 D. Jur. 534 and 1958 J.C.P. II 10805; Cass. crim., March 15, 1961, 1961 D. Jur. 610 and 1961 J.C.P. II 12226.

151. See Cass. crim., February 20, 1958, *supra* note 150.

152. See Paul Monzein, *La responsabilité pénale du médecin*, 1971 R.S.C. 861, 870-72.

153. Cass. crim., March 26, 1997, 1997 R.S.C. 838 obs. Yves Mayaud (constant vomiting provoking death).

154. François Goré, *L'omission de porter secours*, 1946 R.S.C. 202, 210. n. 27 (drafters should have said “without a disproportionate risk”) and the note by Henri Dubois to CA Poitiers, February 2, 1943, 1944 D.C. 44 (risk must not be ‘disproportionate’).

155. See Fillette, *supra* note 113, at 353 (paragraph 34).

doctors, to accept more risk than non-professionals. Thus, doctors, cannot invoke as a defense for inaction the normal risks associated with the practice of medicine, such as the risks posed by persons with contagious diseases or the dangers of making house calls.¹⁵⁶

How such a reasonableness standard applies to laypersons is less clear. The Court of Cassation recently concluded, without explanation, that a motorist, by utilizing his emergency lights, could have pulled over without risk on the shoulder of a busy superhighway.¹⁵⁷ Many motorists, depending on the superhighway, might disagree, but they might be willing to stop if there was good cause, such as mechanical trouble or, as in the actual case, the threat to the life of a little girl wandering onto the highway. However, the Court of Cassation has never formulated a proportionality test requiring the fact finder to compare the amount of risk generated by the rescue with the potential benefit to the person in peril. Lower courts have done so in a few cases. For example, a trial court convicted a hospital director who had refused to admit a patient on the grounds that the hospital was already over capacity (123 admitted patients with a capacity of 103).¹⁵⁸ The court found that the risk to the admitted patients posed by one additional patient was trivial or negligible when compared with the risk to the person refused admittance.¹⁵⁹ Most likely the court was correct, but there was no finding that the defendant's contrary belief was other than in good faith.

The relationship between the would-be rescuer and the person in peril may also affect the risk analysis. Thus, a trial court held that a mother violated the duty to rescue by not intervening personally to prevent the murder of her young daughter by the mother's violent lover, even if that intervention involved some risk of physical harm to the mother.¹⁶⁰ This decision suggests that the duty to rescue is a variable one; the law expects more from persons with personal ties to the victim than from strangers.¹⁶¹ On the other hand, even strangers cannot invoke as a defense unreasonable fears of nonexistent risks. Thus, a trial court convicted ignorant peasants who mistakenly believed that a bicyclist, wounded and bloodied from a fall, was a burglar when they discovered that the bicyclist had entered their rural farmhouse seeking assistance. The peasants' fear for their own safety did not

156. See SOUTOUL, *supra* note 84, at 82.

157. See Cass.crim., March 7, 1991, *supra* note 145.

158. TC Douai, December 20, 1951, 1952 D. Somm. 53 and 1952 G.P. 1 175.

159. See *id.*

160. TC Mont-de-Marsan, January 27, 1959, 1959 J.C.P. II 11086.

161. American law also requires that persons with a duty to act assume some risk to save a life. *State v. Walden*, 293 S.E. 2d 780, 786 (N.C. 1982).

justify evicting the helpless bicyclist without summoning medical assistance.¹⁶² Once again, these cases demonstrate that the mental element of the offense applies to the existence of the peril, but not to the appropriateness of the defendant's response. The defendant must "know" that a person is in peril, but need not know that the needed assistance is risk-free. Reasonableness is the standard, and the squeamish, panicky, or ignorant defendant must bear the risks a reasonable person would bear.

D. Fourth Element: Knowledge of Peril

On the offense's fourth element—the defendant's knowledge of the peril—the courts have vacillated on whether to require that the defendant actually know the gravity of the peril. In many situations it is sufficient that the defendant should have known. As the commentators recognize, the latter approach effectively substitutes a negligence standard for the intent seemingly required by the statutory text.¹⁶³ Nevertheless, the courts have consistently applied that approach to defendants who were not personally present at the scene of the peril but who had been summoned by eyewitnesses to render assistance to the person in peril. These cases have primarily involved medical personnel; eyewitnesses lacking medical training naturally summon them rather than laypersons to render assistance to the sick or injured. In these cases, the courts have imposed a duty of inquiry on the defendant. In other words, a doctor cannot refuse a request to "come quickly," even though the doctor believes that the reported peril does not warrant his or her personal intervention. As explained by the Court of Cassation in *Dr. T*, a doctor "informed of a peril of which he alone is able to judge the seriousness cannot refuse his assistance without doing what he can to assure himself that the peril does not require his personal attention."¹⁶⁴

This decision seemed to tell doctors that their only safe course, when summoned to the scene of an apparent peril, was to go to the scene to investigate themselves. How else could they assure themselves that the person in peril did not require their attention? When doctors did not

162. TC Le Mans, October 22, 1951, 1951 J.C.P. II 6557. Another trial court acquitted a defendant who did not render assistance to a person whose life was in danger because the defendant was busy extinguishing a car fire. CA Riom, March 20, 1947, 1947 D.Jur. 304. The fact that someone else was assisting the person in peril appears to be a better explanation for the acquittal.

163. See, e.g., the note by Jean Lorentz to CA Nancy October 27, 1965 (*Colin*), 1965 D. Jur. 30 and the note by Paul-Albert Pageaud to Cass. crim., January 21, 1954, 1954 J.C.P. II 8050 (*Dr. T*).

164. See Cass. crim., January 21, 1954, *supra* note 116 (police told a doctor of a young man twisting in pain on side of road).

personally examine the person reported to be in peril, courts routinely found that they had sufficient knowledge. Case law from the 1950's and 1960's afforded doctors little leeway to conclude that the eyewitnesses were overexcited or had exaggerated the reported peril or that someone else would attend to it.¹⁶⁵ In the lead 1954 case of *Dr. T*, the doctor had refused a police officer's summons because the person needing assistance was an Arab, but the discriminatory motive for the doctor's inaction did not provide the basis for the Court of Cassation's decision and, in fact, went largely unnoticed at the time.¹⁶⁶

The application of this duty of inquiry in a well-known case in the mid 1960's aroused a storm of criticism, largely provoked by the examining magistrate's jailing the defendant doctor before trial.¹⁶⁷ In that case, a brawl had occurred around 3:00a.m. outside a tavern after a group of drunken conscripts left a Saturday night ball. One of the conscripts was knifed and the others fled. Those who fled were subsequently convicted of failure to rescue. The police promptly arrived and someone called an ambulance. Milling onlookers then realized that Dr. Colin's house was nearby, less than 1000 feet distant, and one of them, a young boy, woke the doctor by loudly knocking on his door. The boy told him "to come quickly as a man is lying on the road bathed in his own blood."¹⁶⁸ The doctor refused to come after learning that the police were already on the scene and that an ambulance was on its way, but he did offer to treat the victim in his home office if someone brought the victim there (no one did). Unfortunately, the ambulance was delayed in arriving and the victim bled to death; there was evidence that if Dr. Colin had responded to the youth's summons, he could have saved the victim by clipping a bleeding artery.¹⁶⁹ On these facts, both level trial courts

165. A leading critic of the duty to rescue argued that the case law was so extreme that it required the Dean of the Paris Medical Faculty to respond to call to treat an ailing person in Carpentras or Marseille five hundred miles away. Note by André Touleman to TC Nancy (*Colin*), January 2, 1965, 1965 G.P. 1 97 (2nd sem.). Of course, no prosecution ever occurred on such facts, but the critic is correct in arguing that the case law contained no limiting principles protecting doctors.

166. The Court of Cassation made no mention of the doctor's motivation, even though it appeared in the unpublished lower court decisions. The only place where I have found it mentioned is SOUTOUL, *supra* note 84, at 74.

167. TC Nancy, June 2, 1965, 1965 G.P. 1 97 note André Touleman (first level trial court); CA Nancy, October 27, 1965, 1966 D. Jur. 30 note Jean Lorentz (second level trial court).

168. *See supra* note 167.

169. The courts' finding that Dr. Colin could have arrived in time to save the victim seems irrelevant since the offense of failure to rescue does not require the occurrence of any actual harm.

convicted the doctor, holding that he had a "manifest duty" to ascertain the condition of the knifing victim.¹⁷⁰

The *Colin* decision proved to be a catalyst for the medical profession's efforts to repeal or narrow the offense of failure to rescue. Doctors and other health care professionals argued that the offense subjected them to special burdens—no one else was likely to be summoned to aid a person in peril—and to judicial interference in the practice of medicine in that courts should not decide when health care professionals should make home visits or go to the scene of an accident.¹⁷¹ Wisely, reform efforts concentrated on narrowing the duty of rescue to apply only to eyewitnesses. Such a bill appeared close to passage in 1968 when the student riots in the Latin Quarter led to the unexpected dissolution of Parliament.¹⁷²

Courts have responded more favorably to a lack of knowledge defense when health care professionals are present at the scene of the peril. Here, the standard seems to be one of actual knowledge, but in effect the courts still impose a duty of inquiry. Thus, a surgeon violated the duty to rescue when he stubbornly, but in good faith, refused to believe that he had perforated the intestinal wall of an infant patient, even though the patient showed signs of such a mishap. If the defendant had examined the incision post-surgery, he would have readily discovered the problem and could have taken measures to save the infant's life.¹⁷³ However, court decisions are more favorable to doctors or other health care professionals who actually examine a person in peril, in most cases the professional's own patient, but fail to discover a peril requiring intervention. Even if the professional's failure to discern the peril is attributable to malpractice, there is no failure to rescue because the defendant lacked the requisite knowledge of the peril.¹⁷⁴ Once the professional is on the job treating a patient, knowledge means actual knowledge and the professional's negligent failure to provide the necessary treatment is characterized as a "misdiagnosis" or an "error in judgment" rather than as a failure to rescue.¹⁷⁵ That analysis applies even if

170. See *supra* note 167.

171. See especially the lengthy note by André Touleman to TC Nancy, June 2, 1965, *supra* note 167.

172. See Fillette, *supra* note 113, at page 354 (paragraph 44).

173. CA Pau, November 21, 1989, 1991 J.C.P. II 21683 note Roselyne Nérac-Croisier.

174. The lead case is Cass. crim., June 25, 1964, 1964 D. Jur. 594 (*sage femme* negligently failed to summon a doctor). See also Cass. crim., November 26, 1969, 1970 D. Somm. 73 (medical intern).

175. See the note by Lise Moret to three Court of Cassation decisions in 1972 J.C.P. II 17474. EMTALA adopts a similar approach. Hospitals and their responsible personnel are civilly liable if an emergency room does not perform an appropriate medical screening

a doctor ceases to treat a patient mistakenly believed to be dead.¹⁷⁶ As a result, most patients suing health care professionals responsible for their treatment allege that the defendant's fault was one of negligence and not of a failure to rescue.¹⁷⁷

The application of the knowledge requirement is more complex when a layperson is an eyewitness to an apparent peril. In these cases, the defendant was usually aware of some peril and did something to respond to the peril. Perhaps the courts, as suggested by commentators, could have held in some of these cases that the defendant had rendered the requisite assistance.¹⁷⁸ However, the Court of Cassation has shied away from that approach when the assistance rendered proved ineffective (the victim died) and the defendant plainly could have done more. The Court has preferred to find defendants not guilty because they did not have knowledge of the peril. In this context, knowledge seems to mean actual knowledge; negligence does not suffice. What the courts are really doing, however, is a bit different. They are using the offense's mental element to exonerate those defendants whose response to the peril was appropriate in the sense that society could not expect them to do more. Rather than confront directly the difficult question of how much we should expect (Macaulay's 'how many steps' problem¹⁷⁹), the courts resolve that question indirectly by holding that defendants, given the inquiries they made and the steps they took to alleviate a peril, did not know that there still remained an "imminent peril" which "immediately required" further intervention on their part.

Two cases demonstrate this approach. In the earlier case, the mayor of a small town found a cyclist lying in a ditch. Believing the cyclist to be drunk or shaken from a fall, the mayor propped him up "comfortably" on a grassy slope on the side of the road. The mayor returned several hours later to check on the cyclist's condition, but found he was no longer there. In fact, other passers-by, finding the cyclist groaning and in shock, had transported

examination, but there is no liability under the act for discharging mis-diagnosed patients. See *Vickers v. Nash General Hosp., Inc.* 78 F. 3d 139, 142 (4th Cir. 1996) (no federal liability for malpractice) (following other circuits).

176. Cass. Crim., May 20, 1992, 1994 R.S.C. 103 obs. Georges Levasseur (doctor's failure to reanimate a living patient was an "error in judgment").

177. See note by Roselyne Nérac-Croisier to CA Pau, November 21, 1989, *supra* note 173. But see CA Paris, November 22, 1989, 1970 J.C.P. II 16375 note Pierre Chambon (a surgeon found criminally and civilly liable for not responding to a patient's distress call). As in many duty to rescue prosecutions, the facts in the Paris case were unusual: the patient was a professional entertainer who had undergone surgery for breast enlargement.

178. See the note by Pierre Bouzat to Cass. crim., December 17, 1959, 1960 D.Jur. 398 (pole case). My analysis relies heavily on Professor Bouzat's insightful note.

179. See Macaulay, *supra* note 15, at 496-497.

him to a hospital where he died from head wounds. The mayor was nevertheless acquitted by the lower courts; the Court of Cassation affirmed on the grounds that the mayor did not know the gravity of the victim's peril.¹⁸⁰ What the Court seemed to be saying was that the law did not expect persons to be "splendid" Samaritans, as was the biblical Samaritan. The mayor was a "minimally decent" Samaritan, which was sufficient to avoid a criminal conviction.¹⁸¹

In the second lead case, the peril also proved deadly. Two pedestrians in an urban neighborhood discovered late at night an old man descending a telephone pole outside a senior citizens' hospice. Several minutes later they returned to the scene and observed that he had become stuck, roughly fifteen feet above the ground, between a wall and the pole. Believing him to be an escapee from the hospice and potentially drunk, they yelled up to him to inquire if he needed any assistance but received no response. They then left the scene but reported the incident to hospice personnel roughly one half hour later. Unfortunately, the man—who was attempting to escape from the hospice—died from a stroke before rescuers could reach him. The lower courts convicted the passers-by, but the Court of Cassation quashed the convictions because there was no showing that the defendants knew that the deceased faced an imminent peril requiring their immediate intervention. According to the Court, the passers-by did not violate the duty to rescue because they did not know that the deceased was in imminent peril of a stroke. Of course, they did know that the old man was in some peril because any old man trapped in such a precarious fashion late at night is in some peril. In addition, they could have notified the hospice more quickly—just reporting what they had observed would have been sufficient. Nevertheless, they did respond in a minimally appropriate fashion to the peril as they perceived it. Their innocence, at least of the criminal charge, seems plain. One wonders how the lower courts could have convicted and sentenced them to a six months suspended sentence.

When the lay defendant has not responded appropriately to a potential peril, courts tend to find that the defendant had sufficient knowledge. In these cases, the courts seem to be applying a negligence standard. In one case, the defendant was chasing late at night a young man who, apparently unintentionally, plunged into a river. The defendant, who fled the scene, acknowledged that he heard a splash but argued that because he heard no cry for help he assumed that the man was safe. In fact, the

180. Cass. crim., November 3, 1954, 1955 D. Jur. 64 note P.A. Pageaud.

181. The quoted terminology is by Judith Thompson. See Judith Thompson, *A Defense of Abortion*, 1 PHIL. AND PUB. AFFAIRS 62-64 (1971).

victim could not swim and drowned. The Court of Appeals convicted the defendant, holding that the defendant should have further inquired as to the peril by advancing the remaining twenty-five meters to the river bank to determine what happened to the plunger.¹⁸² Absent such an inquiry, the defendant could not establish that he did not know there was an imminent peril requiring his personal intervention.

Similarly, the Court of Cassation affirmed a conviction and lengthy prison term despite the defendant's mistaken belief, a belief assumed to be genuine, that the woman he did not aid was already dead. The Court reasoned that the defendant, who had no medical training, could not know the victim was dead until he received confirmation from a doctor.¹⁸³ Finally, and more questionable, in the twentieth century analog to the case of the Imprisoned Woman of Poitiers, the Court found that the deceased's lawyer and a police officer searching for the deceased both knew that the deceased was in peril. They had visited the mother's house on numerous occasions and had noticed a very bad odor but, unlike Marcel Monnier, they had neither observed any mistreatment nor seen the imprisoned daughter. The accompanying note to the court's decision criticizes the Court of Cassation for adopting a *presumption* of knowledge rather than requiring *actual* knowledge.¹⁸⁴

The controversy generated by subjecting health care professionals to a duty of inquiry when confronted by a potential peril has subsided in recent years. In explaining this phenomenon, Jean-Henri Soutoul, the author of the lead treatise on the subject, has emphasized the courts' greater understanding, if not sympathy, for the predicament of doctors summoned to render assistance.¹⁸⁵ However, the case law cited by Professor Soutoul—eleven cases from the 1970's and 1980's—is quite thin and reflects little real change in the law. The low number of cases, both before and after 1970, suggests that the medical profession may have exaggerated the

182. CA Besançon, December 16, 1975, 1976 D. Jur. 166 note Jean Pélier.

183. Cass. crim., November 14, 1989, 1990 G.P. 2 473 note J.P. Doucet. In this case, as in many others, the failure to rescue served as a surrogate for some other, more appropriate offense. The deceased had jumped from the window of the defendant's dwelling to escape the defendant's brutal treatment. The defendant retrieved what he believed to be her corpse and hastily buried it. His guilt of involuntary homicide seems clear.

184. See Cass. crim., October 30, 1990, *supra* note 67. Perhaps one can defend the decision based on the ease with which the defendants could have reported their suspicions to the authorities.

185. See SOUTOUL, *supra* note 84, at 60-69.

problem.¹⁸⁶ In addition, the most significant post-1970 case identified by Professor Soutoul is unreported.¹⁸⁷ In that case, a specialist refused to attend a neighbor suffering a severe 2:00a.m. asthma attack but referred the neighbor's family to a generalist in the same building who had the equipment needed to treat the asthmatic. Although the generalist responded to the summons and successfully treated the victim, both trial level courts convicted the specialist. The Court of Cassation reversed the conviction, and on retrial a new Court of Appeals acquitted the defendant specialist.¹⁸⁸ According to the second Court of Appeals, the defendant had rendered appropriate assistance when he referred the asthmatic's family to the more qualified generalist.¹⁸⁹ According to the court, it would have been "completely useless" for the specialist to have personally treated the person in peril.¹⁹⁰

Changes that have occurred in the practice of emergency medicine provide a more likely explanation for the fading of the medical professions' unhappiness with the duty to rescue. Professor Soutoul identifies those changes, but does not describe their impact on the duty to rescue. The most significant change is the development of a nationwide rescue system.¹⁹¹ Under the system, developed in the 1970's and early 1980's and codified by a 1986 law, there is a single telephone number to call to obtain emergency medical services, including transportation to a hospital. This innovation responds to changes in the practice of medicine produced by modern technology. Those changes have sunk into popular consciousness. No longer do onlookers summon the nearest doctor to aid a person in peril, but they contact emergency medical services, the SAMU,¹⁹² to transport the victim to the nearest hospital with the highest technologically-advanced

186. Professor Soutoul's comprehensive search uncovered 120 health care professionals (108 doctors) prosecuted for failure to rescue between 1948 and 1989. Of those 120 defendants, 113 went to trial. There were 55 convictions, 48 of which survived appeal. *Id.* at 117. Thirty-five of the 55 defendants received prison terms with a mean term of eight months, but the prison term was suspended in all cases. *Id.* at 130. Roughly 80% of the prosecutions involved health care professionals who refused a summons to render assistance. *Id.* at 140 (28 of 34 available cases.) These figures for health care professionals are surprisingly low, given the 200 plus convictions annually in the 1970's and 1980's for failure to rescue. See *supra* note 84.

187. Cass. crim., July 3, 1985, presented in SOUTOUL, *supra* note 84, at 64-65 and 121-22. French medical journals did inform their readers of this decision, which did not even appear in the Court of Cassation's official reporter (the *Bulletin Criminel*). *Id.* at 122 n. 99.

188. CA Dijon, February 28, 1986, reported in SOUTOUL, *supra* note 84, at 65.

189. See *id.*

190. See *id.*

191. See SOUTOUL, *supra* note 84, at 275-76.

192. *Service Aide Médicale d'Urgence* (SAMU).

equipment available to treat emergency patients.¹⁹³ It is the rare case where the passer-by or the nearest physician can do something significant to assist a person in peril. Like the specialist in the prior case, a doctor summoned to the scene renders appropriate assistance by referring the problem to the SAMU. Perhaps, to play it safe, the physician might add, "If they do not come promptly, come back and I will do what I can." Unsurprisingly, the most striking prosecutions of physicians in recent years have involved specialists who have refused a summons to come to a hospital to provide emergency medical care.¹⁹⁴

No one attributes the development of this emergency medicine network in France to that country's decision to criminalize the failure to rescue.¹⁹⁵ Far stronger forces are at work in France and elsewhere. Citizens, aware of the benefits modern medicine offers, now expect the State to assume responsibility for organizing emergency medical services. Rescue has become the job of professionals. All of us contribute to paying for those services through our taxes. As a result, a physician's duty to render assistance—and also perhaps *every* person's duty to render assistance—has become in large part, to use terminology often used by legal philosophers, a duty of imperfect rather than perfect obligation.¹⁹⁶ In other words, we fulfill that duty, as we do our duty to the homeless and the starving, by making charitable contributions—and in more modern days, by paying taxes—to support professional rescuers rather than by intervening to save a particular individual.¹⁹⁷

193. "Patient dumping" is not a problem in France given the availability of universal health coverage.

194. TGI Draguignan, January 28, 1983 D. I.R. 400; CA Grenoble, November 14, 1980, reported in SOUTOUL, *supra* note 84, at 63-64.

195. On the other hand, the criminalization of the failure to rescue did prompt the medical profession to develop an elaborate system of doctors on duty. SOUTOUL, *supra* note 84, at 277-80. In situations not requiring the intervention of the SAMU, a treating physician normally refers a late night or weekend summons to the doctor on duty. Doctors believe that such referrals protect them—at least if they remain in telephone contact in case the doctor on duty proves to be unavailable. Doctors on duty do make house calls (personal experience). At night or on weekends, sick persons often contact the doctor on duty directly through the police rather than first telephoning their treating physician.

196. See SIR JOHN SALMOND, JURISPRUDENCE 70-73 (7th ed. 1924)(last edition prepared by author); see also JOHN STUART MILL, UTILITARIANISM 61 (New York: Bobbs-Merrill 1957).

197. Mill categorized imperfect duties as ones of charity and beneficence "which we are indeed bound to practice but not toward any definite person, nor at any prescribed time." Mill, *supra* note 196, at 61. Salmond likewise considered imperfect duties as standing "outside the scope of an ideal system of civil law, not fit for enforcement by the state or proper to be transformed into legal duties." Salmond, *supra* note 196, at 71. Neither mentioned the duty to rescue.

V. CONCLUSION

France has lived for nearly sixty years with a duty to rescue enforced by the criminal law. Despite its unsavory origins as a Vichy measure to assuage the German occupiers, the duty to rescue has become an accepted part of French criminal law. The story of the duty's enactment and implementation is interesting in its own right for what it tells us about French law. It is also interesting for what it tells us about the difficulties encountered enforcing a duty to rescue. We have never seriously attempted to do so in this country; while four states do have duty to rescue statutes, those statutes are "dormant" at best.¹⁹⁸ That categorization certainly does not apply to the French statute. Sixty years of experience with the French statute teaches us at least three things, none of which should encourage us to follow the French example.

First, the seemingly simple and straightforward statutory text has raised a host of difficulties which the courts have proved unable to resolve satisfactorily through interpretation. Even the basic question of what constitutes a person in "peril"—the first element of the offense—has raised its share of difficulties. What about the dying person whose life cannot be saved or the potential suicide victim or other person who refuses assistance, or the person whose peril is only apparent, either because that "person," unbeknownst to the defendant, is already dead or because the perceived peril did not in fact exist?¹⁹⁹ While the courts have more or less resolved those questions—not always consistently, as demonstrated by the case law on apparent perils,—they have never supplied much guidance on the more significant question of just how serious or imminent the peril must be.²⁰⁰ That unfortunate vagueness leaves considerable room for moral outrage to serve as a standard for guilt.

Second, the courts, with one exception, have never resolved or even honestly confronted the central questions of what assistance the law expects from the rescuer—the second element of the offense—and what risks the law expects the rescuer to incur—the third element of the offense. Despite the clear language of the statutory text, the courts have denied a safe haven to defendants who "assist" the person in peril by calling authorities²⁰¹ and have

198. For analysis of the Vermont, Minnesota, Rhode Island, and Wisconsin statutes, see *supra* text accompanying notes 38-41. On their dormancy, see Givelber, *supra* note 29, at 3194-200 (gathering evidence).

199. See *supra* text accompanying notes 94 to 109 and 123 to 134.

200. See *supra* text accompanying notes 110 to 122.

201. See *supra* text accompanying notes 135 to 140.

expected defendants confronting a person in peril to incur some risk.²⁰² In addition, in determining the lawfulness of a defendant's response to a person in peril, the courts have adopted an objective rather than a subjective approach.²⁰³ Rather than requiring the prosecution to prove that the defendant knew that the assistance, if any, which he or she rendered was ineffective and that the defendant knew he or she could intervene more effectively without risk, the courts have rendered ad hoc judgments on the appropriateness of the defendant's response. Thus, the courts convicted the motorist who refused personally to transport the two bleeding soldiers to the hospital—a transport that would have required him to abandon two of his passengers at the side of the road²⁰⁴—but released the nighttime strollers who waited a half hour before notifying the hospice that an escaping patient was perilously perched on a pole.²⁰⁵ There has been no effort, except in one lower court opinion,²⁰⁶ to balance the magnitude of the peril to the victim(s) against the risk incurred by the rescuer. Surely the conviction of the motorist would have been more palatable if the soldiers' lives had depended on that motorist's personal intervention. In any case, the law remains unacceptably vague as to what response it requires when a potential defendant confronts a person in peril.

Third, the courts have done very little in applying the statute to take into account the revolutionary changes which have occurred in the last two decades in the providing of medical services in emergency situations. High-tech emergency rooms have largely replaced on-the-spot medical or first-aid treatment. In the 1950's and 1960's, long before those developments, courts had broadly interpreted the required knowledge—the fourth element of the offense—to impose a duty of inquiry on health care professionals and even laypersons.²⁰⁷ That case law appeared in both the official and lead unofficial reporters and was the subject of extensive scholarly commentary. The imposition of that duty precluded a defendant who had not made the appropriate inquiry (i.e., rendered, in effect, some assistance) from arguing that he or she did not believe the peril needed the defendant's personal attention, either because it was not that serious or because someone else, such as a more appropriate rescuer, would render the necessary assistance. Thus, as in the Case of *Dr. T*,²⁰⁸ it was irrelevant that the defendant knew that

202. See *supra* text accompanying notes 148 to 155.

203. See *supra* text accompanying notes 141 to 143.

204. Cass. crim., October 9, 1956, *supra* note 140.

205. Cass. crim., December 17, 1959, *supra* note 178.

206. TC Douai, December 20, 1951, *supra* note 158.

207. See *supra* text accompanying notes 163 to 184.

208. See Cass. crim., January 21, 1954, *supra* note 116.

someone else had summoned an ambulance. Arguably, changes in the practice of emergency medicine have undermined much of this earlier case law. However, other than in one unreported decision,²⁰⁹ the Court of Cassation does not appear to have addressed the issue. Scholars—other than Dr. Soutoul, who believes that the courts have rejected the harsh approach of the earlier cases²¹⁰—have largely ignored the duty to rescue in recent years. In the absence of noteworthy cases, they have chosen to write on other topics. Once again, the law remains very vague.

Of course, there has been in recent years one noteworthy incident on the scope of the duty to rescue. In the early morning of August 31, 1997, a speeding car transporting Princess Diana and her escort Emad Al Fayed crashed in a tunnel along the banks of the Seine.²¹¹ Both the Princess and her escort, as well as the driver, died as a result of the crash. At the time of the crash, nine paparazzi on motorcycles or in cars were pursuing the couple. Some of the paparazzi were among the first to arrive at the crime scene and promptly began taking pictures. They did so when it was undisputed that Princess Diana was still alive. The paparazzi's behavior attracted much criticism in the press. They were detained by the police and then subjected to an investigation by two examining magistrates to determine their criminal responsibility in the incident.

Roughly two years later the magistrates found no grounds for charging the paparazzi for unintentional killing or wounding the victims or for failing to render aid to persons in peril, specifically, to Princess Diana and her bodyguard, both of whom were still alive when the paparazzi arrived.²¹² In analyzing the duty to rescue, the magistrates adopted a restrictive approach. They recognized that the summoning and anticipated rapid arrival of emergency services meant that the "legal obligation to personally act is no longer imposed with the same force for any non-specialists present at the scene."²¹³ Applying this watered-down standard to the five paparazzi present at the accident scene, the magistrates found that one of them had rendered the required assistance by calling emergency services on his mobile phone. In addition, they found that three of the remaining four paparazzi knew that one of their colleagues had called emergency services and therefore did not intentionally fail to render assistance to persons in peril,

209. See Cass. crim., July 3, 1985, described in SOUTOUL, *supra* note 84, at 64-65 and 121-22.

210. See SOUTOUL, *supra* note 84, at 60-69.

211. See the decision of the examining magistrates cited in note 212, *infra*, for the facts.

212. The London Times published in English translation the full text of the magistrates' ruling in its edition for September 4, 1999 at pages 5 and 6.

213. See *id.* at 6.

evidently because they believed that someone else had dissipated the peril. Finally, the magistrates found the one paparazzi who was unaware that someone had summoned emergency services—colorfully named Romuald Rat—lacked criminal intent because he took only a “few seconds”²¹⁴ to take three pictures before he approached the car. Upon opening the car door, he took Princess Diana’s pulse, assured her that doctors were on the way, and then heard someone shout, “I have called the emergency services.”²¹⁵ Rat then stopped taking pictures until the first doctor arrived, but rendered no further aid to Princess Diana.

The magistrates’ ruling seems eminently sensible in updating the statute to take into account the role of emergency medical services. The decision nevertheless raises a troubling question. If the paparazis’ innocence was so clear-cut, then why were they detained and investigated for failure to rescue? The explanation seems to lie, at least in part, in the public outrage provoked by their behavior at the accident scene. (There also may have been reason to investigate whether the paparazis’ pursuing the Princess’s limousine caused her death; the magistrates absolved them of responsibility by finding that the chauffeur’s reckless driving was the cause of the crash.) The public wanted blood. The magistrates responded to this concern by asserting that any blaming of the paparazzi “can only be recorded within the circumstances of the moral appreciation or the code of ethics which governs the profession of journalist or photo-journalist.”²¹⁶ In such cases, prosecutors—even French prosecutors who, unlike our largely elected prosecutors, are civil servants—may feel pressure to bring charges. Indeed, a number of the lead French cases suggest that the defendants may have been selected for prosecution on account of their motivation for refusing to render aid.²¹⁷ Vaguely defined offenses permit such abuses of prosecutorial discretion.

These lessons from the French experience, of course, are not conclusive. We may do a better job in enforcing a duty to rescue through the criminal law. States may enact better drafted states and courts may interpret them more skillfully. Perhaps this will occur, but the large body of French case law suggests that the line-drawing problem remains intractable. If Romauld Rat can take a “few” seconds to snap three pictures before opening the car door to ascertain the condition of the passengers, why cannot he take more time to take more pictures? More importantly, the whole line-drawing

214. *See id.*

215. *See id.*

216. *See id.*

217. *See, e.g.,* the cases cited in notes 116 and 117, *supra*.

effort does not seem worth the candle. Given the widespread availability of emergency medical services, it will be a rare case where the law should expect a non-specialist bystander to do more to aid a person in peril than merely to contact the appropriate police or medical personnel. Perhaps such cases may arise in remote areas or on wilderness trips. If a failure to rescue does occur in those contexts—also an unlikely occurrence—, it would seem preferable to analyze the case in terms of whether the defendant had, as a land owner or a fellow camper, a special duty to the person in peril. Even if the defendant did not have a duty, and reacted with “callous indifference” and “excessive egoism” to the victim’s plight, would it not be better to let one moral reprobate go free than to embark on a perilous line-drawing endeavor, trusting prosecutors and juries to select those moral reprobates who should not go free?

My answer to the last question is ‘yes,’ we are better off without a general duty to rescue statute. A symbolic statute, like the statutes found in Vermont, Minnesota, Wisconsin, and Rhode Island, would have little effect, while a vigorously enforced statute would raise intractable line-drawing problems. Unlike the French, we already punish commission by omission when the defendant has a special duty towards the person in peril. Thus, we already punish the most reprehensible failures to render aid; there is no gap in our law to fill with a duty to rescue statute.

Whether we should impose a duty to report is a different question. Such a duty does not appear to raise the same line-drawing problems, but pragmatic considerations such as the state’s need for the information and the state’s ability to respond to the information, including the problem of over-reporting, affect the appropriate scope of any duty to report. A narrowly drafted duty to report statute struck the Nevada legislature as the appropriate response to David Cash’s callous indifference to his friend’s abusing and murdering a seven year old girl. That Nevada statute requires eyewitnesses over sixteen—including “strangers” with no ties to the victim—to report crimes of child abuse.²¹⁸ In my opinion, the French experience demonstrates that response to be more prudent than criminalizing the failure to rescue.

218. Chapter 631, of the 1999 Nevada Sessions Laws, codified as Nev. Rev. St. 870-94 (Supp. 1999). The statute requires the eyewitness to report the abuse to a law enforcement agency “as soon as reasonably practicable but not later than twenty-four hours after the person knows or has reasonable cause to believe” that someone has committed a violent or sexual offense against a child. *Id.* § 202.882. Nevada thus becomes the seventeenth state to require “universal” reporting (i.e., mandatory reporting of child abuse by any person and not just by designated professionals). Givelber, *supra* note 29, at 3183 n. 115. It is unclear how David Cash’s compliance with such a duty to report would have saved the seven year old victim from the murderous clutches of the actual killer.

